TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 753

ÆTNA INSURANCE COMPANY, PETITIONER,

vs.

JOHN M. KENNEDY, 3D, TO THE USE OF ANNA L. BOGASH

No. 754

SPRINGFIELD FIRE & MARINE INSURANCE COMPANY, PETITIONER,

vs.

JOHN M. KENNEDY, 3D, TO THE USE OF ANNA L. BOGASH

No. 755

THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, LIMITED, PETITIONER,

vs.

JOHN M. KENNEDY, 3D, TO THE USE OF ANNA L. BOGASH

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 25, 1937.

CERTIORARI GRANTED MARCH 29, 1937.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JUNE TERM, 1932

No. 17092

JOHN M. KENNEDY, 3RD, to the use of ANNA BOGASH,

vs.

ÆTNA INSURANCE COMPANY

H. Shapiro, Esq.
H. S. Ambler, Esq.

DOCKET ENTRIES

1932.

Aug. 30. Exemplified copy of record from C. P. #4, Philadelphia County, Pa., received and filed.
Sept. 28. Affidavit of Defense, filed.
" 29. Præcipe to place case on Trial List, filed.

1934.

April 17. Jury called—(17094 and 17098) witnesses sworn.
" 18. Verdict for defendant.
" 23. Motion and Reasons for New Trial filed.

[fol. 2] 1935.

Feb. 8. Argued sur motion for New Trial.
" 11. Opinion, Dickinson, J., discharging rule for New Trial, filed.
" 13. Præcipe to enter judgment filed.
" 14. Judgment in favor of defendant, filed.
Mar. 1. Bill of Exceptions and Order of Court sealing same, filed.
Apr. 10. Petition for Appeal, filed.
" 10. Order allowing appeal, filed.
" 10. Assignments of Error filed.
" 10. Bond sur appeal in $250 with New Amsterdam Casualty Company, surety, and Decree approving same, filed.
" 10. Citation allowed and issued.
" 10. Copy of Notice of Appeal, filed.
" 12. Præcipe for transcript of record filed.
" 24. Citation returned: "service accepted" and filed.

[fol. 3] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, JUNE TERM, 1932

No. 17094

JOHN M. KENNEDY, 3RD, to the use of ANNA BOGASH,

vs.

SPRINGFIELD FIRE & MARINE INS. CO.

H. Shapiro, Esq.
H. S. Ambler, Esq.

DOCKET ENTRIES

1932.

Aug. 30. Exemplified copy of record from C. P. #2, Philadelphia County, Pa., received and filed.
Sept. 28. Affidavit of Defense, filed.
" 29. Præcipe to place case on Trial List, filed.

1934.

April 17. Jury called (17092 and 17098) witnesses sworn.
" 18. Verdict for defendant.
" 23. Motion and Reasons for New Trial filed (17092).

[fol. 4] 1935.

Feb. 8. Argued sur motion for New Trial.
" 11. Opinion, Dickinson, J., discharging rule for New Trial, filed (17092).
" 13. Præcipe to enter judgment filed.
" 14. Judgment in favor of defendant, filed.
Mar. 1. Bill of Exceptions and Order of Court sealing same, filed (17092).
Apr. 10. Petition for Appeal, filed.
" 10. Order allowing appeal, filed.
" 10. Assignments of Error filed.
" 10. Bond sur appeal in $250 with New Amsterdam Casualty Company, surety, and Decree approving same, filed.
" 10. Citation allowed and issued.
" 10. Copy of Notice of Appeal, filed.
" 12. Præcipe for transcript of record filed.
" 24. Citation returned: "service accepted" and filed.

[fol. 5] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, JUNE TERM, 1932

No. 17098

JOHN M. KENNEDY, 3RD, to the use of ANNA BOGASH,

vs.

LIVERPOOL AND LONDON AND GLOBE INSURANCE Co., Limited

H. Shapiro, Esq.
H. M. Schell, Esq.

DOCKET ENTRIES

1932.

Aug. 30. Exemplified copy of record from C. P. C. #5, Philadelphia County, Pa., received and filed.
Oct. 10. Affidavit of Defense, filed.
" 14. Præcipe to place case on Trial List, filed.

1934.

Apr. 17. Jury called (17092 and 17094) witnesses sworn.
" 18. Verdict for defendant.
" 23. Motion and reasons for New Trial filed (17092).

[fol. 6] 1935.

Feb. 8. Argued sur motion for New Trial.
" 11. Opinion, Dickinson, J., discharging rule for New Trial filed. (17092).
March 1. Bill of Exceptions and Order of Court sealing same, filed. (17092).
April 4, Præcipe to enter judgment on the verdict filed.
" 4. Judgment in favor of defendant filed.
Apr. 10. Petition for Appeal, filed.
" 10. Order allowing appeal, filed.
" 10. Assignments of Error filed.
" 10. Bond sur appeal in $250 with New Amsterdam Casualty Company, surety, and Order of Court approving same, filed.
" 10. Citation allowed and issued.
" 10. Copy of Notice of Appeal, filed.
" 12. Præcipe for transcript of record filed.
" 24. Citation returned: "service accepted" and filed.

[fol. 7] In United States District Court, June Term, 1932
No. 17092

John M. Kennedy, 3rd, to use of Anna L. Bogash,

vs.

Ætna Inrurance Company

Statement of Claim—Filed in Common Pleas Court July 21, 1932

1. The name of the plaintiff is John M. Kennedy, 3rd.

2. The name of the use plaintiff is Anna L. Bogash.

3. In or about the 26th day of March, 1932, the said plaintiff, John M. Kennedy, 3rd, for good and valuable consideration, assigned, transferred and set over unto the use plaintiff, Anna L. Bogash, all his right, title and interest in the claim against the defendant and in the fire insurance policy constituting the basis of the said claim and to the loss payable by defendant under said policy, to which policy reference will be more fully made hereafter, and which policy is the basis of this suit.

[fol. 8] 4. The name of the defendant is the Ætna Insurance Company. It is a corporation engaged in the business of insuring persons and buildings against loss by fire and duly registered under the laws of the State of Pennsylvania for the purpose of doing such business in this State.

5. On, to wit, the 17th day of July, 1931, defendant, under its policy #22611, in consideration of a premium to it paid and by it received, executed in writing, issued and delivered to and in behalf of plaintiffs, a certain policy of insurance under its policy #22611, in the sum of $5,000, and the other particulars and provisions of which are as hereinafter more fully set forth. The policy issued by defendant, as aforesaid, is now in possession of the defendant, of which policy it wrongfully possessed itself without any right, authority from, or consent by either the plaintiff or the use plaintiff. The use plaintiff has frequently demanded from defendant a copy of said policy so that same may be attached to this suit thereon, but defendant has refused to furnish the same. Plaintiff is therefore unable to attach to this statement of claim any copy of said policy.

6. Plaintiffs are informed, believe it to be true and therefore aver that the policy was the standard form of policy required by the Acts of Assembly of the State of Pennsylvania, to wit, the Act of May 17, 1921, P. L. 682, Article V, Section 523, and contained all of the standard provisions in said statute set forth. Plaintiffs are informed, believe it to be true and therefore aver that Exhibit "A" attached to this Statement of Claim and made part hereof is a true and correct copy of this standard form of policy, and of the standard [fol. 9] provisions of the policy issued by defendant as aforesaid.

7. It is averred that the assured under the policy aforesaid, and so stated and denominated in the policy, was the Glenwood Industrial Distilling Company, and that the building insured against fire under the policy aforesaid, and in said policy described, (as has been stated, plaintiffs cannot set forth a copy of said description because the policy is in the hands of defendant) is the one situate on Cedar Street and Tioga Street, in the City of Philadelphia. Plaintiffs are informed, believe it to be true and therefore aver that in addition to the standard provisions hereinbefore referred to the policy contained the special provisions set forth in Exhibit "B" hereto attached and made part of this Statement of Claim, and that plaintiffs believe Exhibit "B" to be a true anl correct copy of such special provisions. Plaintiffs are informed that there are other special provisions which they do not recollect and which cannot be set forth as copy because they are in the hands of defendant, as has been hereinbefore set forth.

8. The interest of the plaintiff, John M. Kennedy, 3rd, in the premises hereinbefore referred to was that of mortgagee in that the said John M. Kennedy, 3rd, held a mortgage which constituted a first lien on the building and property referred to in the principal sum of $25,000, which mortgage was recorded at Philadelphia, in Mortgage Book J. M. H. No. 2288, page 352, &c.

9. In the late hours of March 24, 1932, or in the early hours of March 25, 1932, a fire broke out at said premises and completely destroyed the same.

[fol. 10] 10. Plaintiffs are informed, believe it to be true and therefore aver that the fire and the loss or damage resulting therefrom was not caused directly or indirectly by

invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at or after the fire.

11. On, to wit, the 28th day of March, 1932, the use plaintiff, Anna L. Bogash, by her attorney in fact, Harry Bogash, notified and advised defendant of said fire and loss, a true and correct copy of which notice is hereto attached, marked Exhibit "C" and made part hereof.

12. Plaintiffs are informed, believe it to be true and therefore aver that the Glenwood Industrial Distilling Company did, within sixty days from the date of said fire, to wit, on or about the 17th day of May, 1932, file with the defendant company a proof of statement of the loss resulting from the fire aforesaid, a true and correct copy of which is hereto attached, marked Exhibit "D" and made part hereof.

13. Plaintiffs aver that they have performed all things on their part to be performed in connection with the loss due and payable under the policy of insurance aforesaid.

14. Plaintiffs aver that defendant has broken its covenant on its part to be performed, as set forth in the policy, and has refused to pay the amount called for by said policy or any part thereof, but on the contrary has informed plaintiffs that they would not make payment under said policy [fol. 11] and has repudiated the same and has informed plaintiffs that they were in no way liable under said policy.

15. Plaintiffs aver that the total insurance outstanding on said buildings at the time of the fire as in the proof claim hereinbefore referred to set forth, to wit:

Ætna Insurance Co.	$5,000.00
Springfield Fire & Marine Ins. Co.	5,000.00
Connecticut Fire Ins. Co.	2,500.00
The Liverpool & London & Globe Ins. Co., Ltd.	5,000.00
	$17,500.00

16. Plaintiffs are informed, believe it to be true and therefore aver that the value of the buildings destroyed by fire as aforesaid was in excess of $20,000.00.

Wherefore, plaintiffs claim there is now justly due and owing to them by defendant the sum of $5,000.00 with interest from May 25, 1932.

Harry Shapiro, Attorney for Plaintiffs.

Duly sworn to by Anna L. Bogash. Jurat omitted in printing.

[fol. 12] For Exhibit "A" to Statement of Claim (Policy of Insurance) see Bill of Exceptions—Page 56.

EXHIBIT "B" TO STATEMENT OF CLAIM

Loss or damage, if any, under this policy, shall be payable to John M. Kennedy, 3rd, as mortgagee (or trustee), as interest may appear, and this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; Provided, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same.

Provided also, that the mortgagee (or trustee) shall [fol. 13] notify this company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee) and, unless permitted by this policy, it shall be noted thereon, and the mortgagee (or trustee) shall in demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void.

This company reserves the right to cancel this policy at any time as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice of the mortgagee (or trustee) of such cancellation and shall then cease, and this company shall have the right, on like notice, to cancel this agreement.

Whenever this company shall pay the mortgagee (or trustee) any sum for loss or damage under this policy and

shall claim that, as to the mortgagor or owner, no liability therefor existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may at its option, pay the mortgagee (or trustee) the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of its claim.

Permission is granted to carry additional insurance in any other company.

Non-occupancy is hereby permitted for any and every term.

[fol. 14] EXHIBIT "C" TO STATEMENT OF CLAIM

March 28th, 1932.

Ætna Fire Insurance Co., 226 Walnut Street, Philadelphia, Pa.

GENTLEMEN:

I represent Anna L. Bogash, to whom John M. Kennedy, 3rd, assigned his right and interest to a certain fire loss occurring to the property of the Glenwood Industrial Distilling Co. situate on Cedar Street and Tioga Street. I understand that on July 17th, 1931, you issued a policy under No. 22611, in favor of the Glenwood Industrial Distilling Co., as owner and John M. Kennedy, 3rd, mortgagee, covering the aforesaid property, for the period of one year from the aforesaid date, in the sum of $5,000.00.

I wish to inform you that a fire broke out on said premises of the Glenwood Industrial Distilling Co. in the late hours of March 24th, 1932, or the early hours of March 25th, 1932, causing complete destruction of the said property. I shall appreciate your sending me your customary form or proof of loss to be filed in such matters.

Yours very truly, Harry J. Bogash.

HJB:EBNA.
Registered, Return Receipt Requested.

[fol. 15] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF DEFENSE, No. 17092—Filed September 28, 1932

COUNTY OF PHILADELPHIA,
State of Pennsylvania, ss:

Thomas F. Buchanan being duly sworn according to law deposes and says that he is the Assistant Secretary of the Ætna Insurance Company, the above named defendant, duly authorized to make this affidavit of defense on its behalf, and that he makes the same in part of his own knowledge and in part on information and belief founded upon investigation of the facts herein contained, which investigation has been made under the direction and supervision of deponent, to whom reports thereof have been duly submitted by investigators employed by defendant; and that insofar as the averments hereof are based upon deponent's personal knowledge, they are true and correct, and insofar as they are based upon information and belief deponent is informed and verily believes that they are true and correct and expects to prove the same upon a trial of the above entitled cause. Deponent, therefore, deposes and says that the said Ætna Insurance Company, defendant herein, has a full, just and legal defense to the whole of plaintiffs' statement of claim of the following nature and character, to wit:

1. Admitted.

2. Admitted.

3. The means of the proof of the facts alleged in the third paragraph of plaintiffs' statement of claim is under the exclusive control of the plaintiffs and, therefore, the defendant demands proof of all these facts by the plaintiffs; [fol. 16] in accordance with the provisions of section 1 of June 12, 1931, P. L. 557.

4. Admitted.

5. Admitted that on July 17, 1931, defendant, in consideration of the stipulations mentioned in the policy and of the premium therein set forth, executed in writing, issued and delivered its policy No. 22611; that said policy is now in the possession of the defendant, (a copy whereof, marked

Exhibit "A" is hereto attached and made a part hereof); and that defendant has refused to furnish a copy of said policy to the use plaintiff. But denied, (1) that said policy was issued to and in behalf of plaintiffs; (2) that defendant wrongfully possessed itself of said policy without any right so to do; (3) that right or authority from or consent by either the plaintiff or the use plaintiff was necessary to enable the defendant to possess itself of the said policy; and (4) that defendant is not required by law to furnish a copy of said policy to the use plaintiff.

5A. For further answer to paragraph 5 of the plaintiffs' statement of claim, defendant avers that said policy No. 22611 was executed, issued and delivered by defendant to the Corn Exchange National Bank and Trust Company, a corporation of Pennsylvania, and the second mortgagee of the premises described in said policy, at its special instance and request; that the premium of said policy was paid by said Corn Exchange National Bank and Trust Company and that said policy was procured by the said Bank and Trust Company to protect its interests as second mortgagee.

[fol. 17] 5B. Defendant further avers that although said policy No. 22611 on its face does insure the "Glenwood Industrial Distilling Company, and legal representatives", said policy was so worded solely because that is the language of the standard form of fire insurance policy prescribed by the statutes of Pennsylvania; that although there was also attached to said policy the standard mortgagee clause prescribed by the statutes of Pennsylvania, which provided that, "loss or damage, if any, under this policy shall be payable to John M. Kennedy, 3rd, mortgagee (or trustee) as interest may appear," said policy also contained the following further provision, "it is understood that the buildings insured hereunder are now under foreclosure proceedings by the Corn Exchange National Bank and Trust Company. The premium being paid by the Corn Exchange National Bank and Trust Company, it is agreed that in event of loss, same will be adjusted with the Corn Exchange National Bank and Trust Company and paid to them and John M. Kennedy, 3rd, mortgagee, as interest may appear;" and the defendant is advised and therefore avers that by reason of said last quoted provision the said Corn Exchange National Bank and Trust Company was in law the insured in said policy and that the said policy was primarily for the

benefit of said Bank and Trust Company, and that any loss accruing under said policy was payable to said Bank and Trust Company in preference to said John M. Kennedy, 3rd, and that the proceeds of said policy were not sufficient to make whole the said Bank and Trust Company.

5C. Defendant further avers that the whole of the preminum for said policy No. 22611 was paid by the said Corn Exchange National Bank and Trust Company; that no con-[fol. 18] sideration for the issuance of said policy moved from the said John M. Kennedy, 3rd, the legal plaintiff.

5D. Defendant further avers that possession of said policy No. 22611 was retained by the said Corn Exchange National Bank and Trust Company, after said policy was issued and delivered to it until February 27, 1932, when said policy was surrendered by said Bank and Trust Company to the defendant for cancellation; that on said date said policy was cancelled and annulled as of January 17, 1932, and the unearned premium therefor was repaid to and received by the said Bank and Trust Company; that said John M. Kennedy, 3rd, was notified by the said Bank and Trust Company of its intention to surrender and cancel said policy, and acquiesced therein; and that said policy No. 22611 was not in force at the time of the loss averred in plaintiffs' statement of claim, but had been surrendered and cancelled prior thereto.

6. Admitted, except that Exhibit "A" attached to the plaintiffs' statement of claim is not a true and correct copy of said policy No. 22611, because it does not contain the clause quoted in paragraph 5B to wit: "it is understood that the buildings insured hereunder are now under foreclosure proceedings by the Corn Exchange National Bank and Trust Company. The premium being paid by the Corn Exchange National Bank and Trust Company, it is agreed that in event of loss, same will be adjusted with the Corn Exchange National Bank and Trust Company and paid to them and John M. Kennedy, 3rd, mortgagee, as interest may appear."

[fol. 19] 7. Denied, except that said policy No. 22611 contains other special provisions than those contained in Exhibit "A" and Exhibit "B" attached to plaintiffs' statement of claim; and averred that the Corn Exchange National Bank and Trust Company, not the Glenwood Indus-

trial Distilling Company was the assured under said policy No. 22611; that the property described in and insured by the said policy was not situate "on Cedar Street and Tioga Street" as averred in plaintiffs' statement of claim, but was situate, as stated in said policy, "on the north side of Cedar Street, about 200 feet north of Tioga Street;" that the said policy did not contain the provisions of the last paragraph of Exhibit "B", attached to the plaintiffs' statement of claim that "non-occupancy is permitted for each and every term".

8. Denied; and averred that the mortgage held by said John M. Kennedy, 3rd was not a first lien on the building and property described in said policy No. 22611, inasmuch as the property on which said mortgage was a first lien was described in said mortgage as follows:

"All that certain lot or piece of ground with buildings and improvements thereon erected; Situate on the southeast side of Cedar Street (50 feet wide) at the distance of 195 feet northeastward from the northeast side of Tioga Street (60 feet wide) in the 45th Ward of the said City of Philadelphia.

Containing a front or breadth on said Cedar Street 92 feet and extending of that width in length or depth southeastward between lines parallel with Venango Street 167 feet 9⅜ inches to the middle of a certain railroad track."

9. Denied that the premises described in policy No. 22611 [fol. 20] were destroyed by fire; but admitted that property of the Glenwood Industrial Distilling Company was partially destroyed by fire at or about the time mentioned.

10. Denied.

11. Denied; and defendant avers that the notice attached to plaintiffs' statement of claim as Exhibit "C" did not refer to policy No. 22611 and did not notify the defendant that a fire and loss had occurred to the property described in said policy No. 22611, or that the use plaintiff claimed any interest in that property.

12. Denied; and defendant avers that the proofs of loss filed by the Glenwood Industrial Distilling Company with the defendant were not proofs of loss resulting from a fire on the premises described in said policy No. 22611.

13. Denied for the reasons above set forth.

14. Denied that defendant has broken its covenant on its part to be performed as set forth in said policy No. 22611; the other averments of paragraph 14 of the plaintiffs' statement of claim are admitted.

15. Denied; and defendant avers that the outstanding insurance mentioned in paragraph 15 of the plaintiffs' statement of claim was not on the buildings which were partially destroyed by fire.

16. Plaintiff has no knowledge of the value of the buildings alleged in the plaintiff's statement of claim to have [fol. 21] been destroyed by fire; but denies liability for any part of the value of said buildings.

Wherefore, defendant denies that it is indebted to the plaintiffs in any sum whatsoever.

All of which defendant avers to be true and expects to be able to prove at the trial of the cause.

Thos. F. Buchanan, Assistant Secretary.

Sworn to and subscribed before me this 23rd day of September A. D. 1932. Marius R. Jewett, Notary Public. My commission expires Jan. 31, 1935. (Seal.)

For Exhibit "A" to Affidavit of Defense (Policy of Insurance) see Bill of Exceptions—Side folio 56.

[fol. 22] In United States District Court, June Term, 1932

No. 17094

John M. Kennedy, 3rd, to Use of Anna L. Bogash,

vs.

Springfield Fire & Marine Insurance Company

Statement of Claim—Filed in Common Pleas Court July 21, 1932

1. The name of the plaintiff is John M. Kennedy, 3rd.

2. The name of the use plaintiff is Anna L. Bogash.

3. On or about the 26th day of March, 1932, the said plaintiff, John M. Kennedy, 3rd, for good and valuable con-

sideration, assigned, transferred and set over unto the use plaintiff, Anna L. Bogash, all his right, title and interest in the claim against the defendant and in the fire insurance policy constituting the basis of the said claim and to the loss payable by defendant under said policy, to which policy reference will be more fully made hereafter, and which policy is the basis of this suit.

[fol. 23] 4. The name of the defendant is the Springfield Fire & Marine Insurance Company. It is a corporation engaged in the business of insuring persons and buildings against loss by fire and duly registered under the laws of the State of Pennsylvania for the purpose of doing such business in this State.

5. On, to wit, the 17th day of July, 1931, defendant, under its policy #25322, in consideration of a premium to it paid and by it received, executed in writing, issued and delivered to and in behalf of plaintiffs, a certain policy of insurance under its policy #25322, in the sum of $5,000, and the other particulars and provisions of which are as hereinafter more fully set forth. The policy issued by defendant, as aforesaid, is now in the possession of the defendant, of which policy it wrongfully possessed itself without any right, authority from, or consent by either the plaintiff or the use plaintiff. The use plaintiff has frequently demanded from defendant a copy of said policy so that same may be attached to this suit thereon, but defendant has refused to furnish the same. Plaintiff is therefore unable to attach to this statement of claim any copy of said policy.

6. Plaintiffs are informed, believe it to be true and therefore aver that the policy was the standard form of policy required by the Acts of Assembly of the State of Pennsylvania, to wit, the Act of May 17, 1921, P. L. 682, Article V, Section 523, and contained all of the standard provisions in said statute set forth. Plaintiffs are informed, believe it to be true and therefore aver that Exhibit "A" attached to this statement of claim and made part hereof is a true and correct copy of this standard form of policy, and of the standard provisions of the policy issued by defendant as aforesaid.

[fol. 24] 7. It is averred that the assured under the policy aforesaid, and so stated and denominated in the policy, was the Glenwood Industrial Distilling Company, and that the

building insured against fire under the policy aforesaid, and in said policy described, (as has been stated, plaintiffs cannot set forth a copy of said description because the policy is in the hands of defendant) is the one situate on Cedar Street and Tioga Street, in the City of Philadelphia. Plaintiffs are informed, believe it to be true and therefore aver that in addition to the standard provisions hereinbefore referred to, the policy contained the special provisions set forth in Exhibit "B" hereto attached and made part of this statement of claim, and that plaintiffs believe Exhibit "B" to be a true and correct copy of such special provisions. Plaintiffs are informed that there are other special provisions which they do not recollect and which cannot be set forth as copy because they are in the hands of defendant, as has been hereinbefore set forth.

8. The interest of the plaintiff, John M. Kennedy, 3rd, in the premises hereinbefore referred to was that of mortgagee in that the said John M. Kennedy, 3rd, held a mortgage which constituted a first lien on the building and property referred to in the principal sum of $25,000, which mortgage was recorded at Philadelphia, in Mortgage Book J. M. H. No. 2288, page 352, &c.

9. In the late hours of March 24, 1932, or in the early hours of March 25, 1932, a fire broke out at said premises and completely destroyed the same.

10. Plaintiffs are informed, believe it to be true and therefore aver that the fire and the loss or damage resulting [fol. 25] therefrom was not caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at or after the fire.

11. On to wit the 28th day of March, 1932, the use plaintiff, Anna L. Bogash, by her attorney in fact, Harry Bogash, notified and advised defendant of said fire and loss, a true and correct copy of which notice is hereto attached, marked Exhibit "C" and made part hereof.

12. Plaintiffs aver that they have performed all things on their part to be performed in connection with the loss due and payable under the policy of insurance aforesaid.

13. Plaintiffs aver that defendant has broken its covenant on its part to be performed, as set forth in the policy, and has refused to pay the amount called for by said policy or any part thereof, but on the contrary, on, to wit, April 2 and April 4, 1932, through its secretary, W. A. Herbert, informed plaintiffs that they would not make payment under said policy and has repudiated the same and has informed plaintiffs that they were in no way liable under said policy.

15. Plaintiffs aver that the total insurance outstanding on said buildings at the time of the fire was as follows, to wit:

Springfield Fire & Marine Ins. Co.	$5,000.00
Connecticut Fire Ins. Co.	2,500.00
Aetna Insurance Co.	5,000.00
[fol. 26] The Liverpool & London & Globe Ins. Co., Ltd.	5,000.00
	$17,500.00

16. Plaintiffs are informed, believe it to be true and therefore aver that the value of the buildings destroyed by fire as aforesaid was in excess of $20,000.00.

Wherefore, plaintiffs claim that there is now justly due and owing to them by defendant the sum of $5,000.00 with interest from May 25, 1932.

Harry Shapiro, Attorney for Plaintiffs.

Duly sworn to by Anna L. Bogash. Jurat omitted in printing.

[fol. 27] (For Exhibit "A" to Statement of Claim (Policy of Insurance) see Bill of Exceptions—Side folio 70.)

EXHIBIT "B" TO STATEMENT OF CLAIM

Loss or damage, if any, under this policy, shall be payable to John M. Kennedy, 3rd, as mortgagee (or trustee), as interest may appear, and this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner

of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; Provided, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same.

Provided also, that the mortgagee (or trustee) shall notify this company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee) and, unless permitted by this policy, it shall be noted thereof, and the mortgagee (or trustee) shall on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void.

This company reserves the right to cancel this policy at any time as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice of the [fol. 28] mortgagee (or trustee) of such cancellation and shall then cease, and this company shall have the right, on like notice, to cancel this agreement.

Whenever this company shall pay the mortgagee (or trustee) any sum for loss or damage under this policy and shall claim that, as to the mortgagor or owner, no liability therefor existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may, at its option, pay the mortgagee (or trustee) the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of its claim.

Permission is granted to carry additional insurance in any other company.

Non-occupancy is hereby permitted for any and every term.

EXHIBIT "C" TO STATEMENT OF CLAIM

March 28th, 1932.

Springfield Fire & Marine Ins. Co., 333 Walnut Street, Philadelphia, Pa.

GENTLEMEN:

I represent Anna L. Bogash, to whom John M. Kennedy, 3rd, assigned his right and interest to a certain fire loss occur-ing to the property of the Glenwood Industrial Distilling Co. situate on Cedar Street and Tioga Street. I [fol. 29] understand that on July 17th, 1931, you issued a policy under No. 25322 in favor of the Glenwood Industrial Distilling Co., as owner and John M. Kennedy, 3rd, mortgagee, covering the aforesaid property, for the period of one year from the aforesaid date, in the sum of $5,000.00.

I wish to inform you that a fire broke out on said premises of the Glenwood Industrial Distilling Co. in the late hours of March 24th, 1932, or the early hours of March 25th, 1932, causing complete destruction of the said property. I shall appreciate your sending me your customary form or proof of loss to be filed in such matters.

Yours very truly, Harry J. Bogash.

HJB:EBNA
Registered, Return Receipt Requested.

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF DEFENSE, No. 17094—Filed September 28, 1932

COUNTY OF PHILADELPHIA,
State of Pennsylvania, ss:

W. B. Cruttenden being duly sworn according to law deposes and says that he is the Vice President of the Springfield Fire & Marine Insurance Company, the above named defendant, duly authorized to make this affidavit of defense on its behalf, and that he makes the same in part of his own knowledge and in part on information and belief founded upon investigation of the facts herein contained, which investigation has been made under the direction and supervision of deponent, to whom reports thereof have been duly

submitted by investigators employed by defendant; and that insofar as the averments hereof are based upon de-
[fol. 30] ponent's personal knowledge, they are true and correct, and insofar as they are based upon information and belief deponent is informed and verily believes that they are true and correct and expects to prove the same upon a trial of the above entitled cause. Deponent, therefore, deposes and says that the said Springfield Fire & Marine Insurance Company, defendant herein, has a full, just and legal defense to the whole of the plaintiffs' statement of claim of the following nature and character, to wit:

1. Admitted.

2. Admitted.

3. The means of the proof of the facts alleged in the third paragraph of plaintiffs' statement of claim is under the exclusive control of the plaintiffs and, therefore, the defendant demands proof of all these facts by the plaintiffs; in accordance with the provisions of section 1 of June 12, 1931, P. L. 557.

4. Admitted.

5. Admitted that on July 17, 1931, defendant, in consideration of the stipulations mentioned in the policy and of the premium therein set forth, executed in writing, issued and delivered its policy No. 25322; that said policy is now in the possession of the defendant; (a copy whereof, marked Exhibit "A", is hereto attached and made a part hereof), and that defendant has refused to furnish a copy of said policy to the use plaintiff. But denied, (1) that said policy was issued to and in behalf of plaintiffs; (2) that defendant wrongfully possessed itself of said policy without any right so to do; (3) that right or authority from or consent by
[fol. 31] either the plaintiff or the use plaintiff was necessary to enable the defendant to possess itself of the said policy; and (4) that defendant is not required by law to furnish a copy of said policy to the use plaintiff.

5A. For further answer to paragraph 5 of the plaintiffs' statement of claim, defendant avers that said policy No. 25322 was executed, issued and delivered by defendant to the Corn Exchange National Bank and Trust Company, a corporation of Pennsylvania, and the second mortgagee of

the premises described in said policy, at its special instance and request; that the premium of said policy was paid by said Corn Exchange National Bank and Trust Company and that said policy was procured by the said Bank and Trust Company to protect its interests as second mortgagee.

5B. Defendant further avers that although said policy No. 25322 on its face does insure the "Glenwood Industrial Distilling Company, and legal representatives", said policy was so worded solely because that is the language of the standard form of fire insurance policy prescribed by the statutes of Pennsylvania; and that although there was also attached to said policy the standard mortgagee clause prescribed by the statutes of Pennsylvania, which provided that, "loss or damage, if any, under this policy shall be payable to John M. Kennedy, 3rd, mortgagee (or trustee) as interest may appear," said policy also contained the following further provision, "it is understood that the buildings insured hereunder are now under foreclosure proceedings by the Corn Exchange National Bank and Trust Company. The premium being paid by the Corn Exchange [fol. 32] National Bank and Trust Company, it is agreed that in event of loss, same will be adjusted with the Corn Exchange National Bank and Trust Company and paid to them and John M. Kennedy, 3rd, mortgagee, as interest may appear;" and the defendant is advised and therefore avers that by reason of said last quoted provision the said Corn Exchange National Bank and Trust Company was in law the insured in said policy, and that the said policy was primarily for the benefit of said Bank and Trust Company, and that any loss accruing under said policy was payable to said Bank and Trust Company in preference to said John M. Kennedy, 3rd and that the proceeds of said policy were not sufficient to make whole the said Bank and Trust Company.

5C. Defendant further avers that the whole of the premium for said policy No. 25322 was paid by the said Corn Exchange National Bank and Trust Company; that no consideration for the issuance of said policy moved from the said John M. Kennedy, 3rd, the legal plaintiff.

5D. Defendant further avers that possession of said policy No. 25322 was retained by the said Corn Exchange

National Bank and Trust Company, after said policy was issued and delivered to it until February 27th, 1932, when said policy was surrendered by said Bank and Trust Company to the defendant for cancellation; that on said date said policy was cancelled and annulled as of January 17, 1932, and the unearned premium therefor was repaid to and received by the said Bank and Trust Company; that said John M. Kennedy, 3rd was notified by the said Bank and Trust Company of its intention to surrender and cancel said policy, and acquiescence therein; and that said [fol. 33] policy No. 25322 was not in force at the time of the loss averred in plaintiffs' statement of claim, but had been surrendered and cancelled prior thereto.

6. Admitted, except that Exhibit "A" attached to the plaintiffs' statement of claim is not a true and correct copy of said policy No. 25322, because it does not contain the clause quoted in paragraph 5B of this affidavit of defense, to wit: "it is understood that the buildings insured hereunder are now under foreclosure proceedings by the Corn Exchange National Bank and Trust Company. The premium being paid by the Corn Exchange National Bank and Trust Company, it is agreed that in event of loss, same will be adjusted with the Corn Exchange National Bank and Trust Company and paid to them and John M. Kennedy, 3rd, mortgagee, as interest may appear."

7. Denied, except that said policy No. 25322 contains other special provisions than those contained in Exhibit "A" and Exhibit "B" attached to plaintiffs' statement of claim; and averred that the Corn Exchange National Bank and Trust Company, not the Glenwood Industrial Distilling Company was the assured under said policy No. 25322; that the property described in and insured by the said policy was not situate "on Cedar Street and Tioga Street" as averred in plaintiffs' statement of claim, but was situate, as stated in said policy, "on North side of Cedar Street, about 200 feet north of Tioga Street;" that the said policy did not contain the provisions of the last paragraph of Exhibit "B", attached to the plaintiffs' statement of claim that "non-occupancy is permitted for each and every term."

[fol. 34] 8. Denied; and averred that the mortgage held by said John M. Kennedy, 3rd was not a first lien on the building and property described in said policy No. 25322,

inasmuch as the property on which said mortgage was a first lien was described in said mortgage as follows:

"All that certain lot or piece of ground with buildings and improvements thereon erected, Situated on the southeast side of Cedar Street (50 feet wide) at the distance of 195 feet northeastward from the northeast side of Tioga Street (60 feet wide) in the 45th Ward of the said City of Philadelphia.

Containing a front or breadth on said Cedar Street 92 feet and extending of that width in length or depth southeastward between lines parallel with Venango Street 167 feet 9⅜ inches to the middle of a certain railroad track."

9. Denied that the premises described in policy No. 25322 were destroyed by fire; but admitted that property of the Glenwood Industrial Distilling Company was partially destroyed by fire at or about the time mentioned.

10. Denied.

11. Denied; and defendant avers that the notice attached to plaintiffs' statement of claim as Exhibit "C" did not refer to policy No. 25322 and did not notify defendant that a fire and loss had occurred to the property described in said policy No. 25322, or that the use plaintiff claimed any interest in that property.

12. Denied for the reasons above set forth.

[fol. 35] 13. Denied that defendant has broken its covenant on its part to be performed as set forth in said policy No. 25322; the other averments of paragraph 13 of the plaintiffs' statement of claim are admitted.

15. Denied; and defendant avers that the outstanding insurance mentioned in paragraph 15 of the plaintiffs' statement of claim was not on the buildings which were partially destroyed by fire.

16. Plaintiff has no knowledge of the value of the buildings alleged in the plaintiffs' statement of claim to have been destroyed by fire; but denies liability for any part of the value of said buildings.

Wherefore, defendant denies that it is indebted to the plaintiffs in any sum whatsoever.

All of which defendant avers to be true and expects to be able to prove at the trial of the cause.

W. B. Cruttenden.

Sworn to and subscribed before me this 23rd day of September A. D. 1932. Charles M. Heidel, Notary Public. My commission expires February 24, 1933. (Seal.)

For Exhibit "A" to Affidavit of Defense (Policy of Insurance) see Bill of Exceptions—side folio 70.

[fol. 36] IN UNITED STATES DISTRICT COURT, JUNE TERM, 1932

No. 17098

JOHN M. KENNEDY, 3RD, to use of ANNA L. BOGASH,

vs.

THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, LIMITED

STATEMENT OF CLAIM—Filed in Common Pleas Court July 21, 1932

1. The name of the plaintiff is John M. Kennedy, 3rd.

2. The name of the use plaintiff is Anna L. Bogash.

3. On or about the 26th day of March, 1932, the said plaintiff, John M. Kennedy, 3rd, for good and valuable consideration, assigned, transferred and set over unto the use plaintiff, Anna L. Bogash, all his right, title and interest in the claim against the defendant and in the fire insurance policy constituting the basis of the said claim, and to the loss payable by defendant under said policy, to which policy reference will be more fully made hereafter, and which policy is the basis of this suit.

4. The name of the defendant is The Liverpool and London and Globe Insurance Company, Limited. It is a corporation engaged in the business of insuring persons and

[fol. 37] buildings against loss by fire and duly registered under the laws of the State of Pennsylvania for the purpose of doing such business in this State.

5. On, to wit, the 17th day of July, 1931, defendant, under its policy #L331072, in consideration of a premium to it paid and by it received, executed in writing, issued and delivered to and in behalf of plaintiffs, a certain policy of insurance under its policy #L331072, in the sum of $5,000.00, and the other particulars and provisions of which are as hereinafter more fully set forth. The policy issued by defendant, as aforesaid is now in the possession of the defendant, of which policy it wrongfully possessed itself without any right, authority from, or consent by either the plaintiff or the use plaintiff. The use plaintiff has frequently demanded from defendant a copy of said policy so that same may be attached to this suit thereon, but defendant has refused to furnish the same. Plaintiff is therefore unable to attach to this statement of claim any copy of said policy.

6. Plaintiffs are informed, believe it to be true and therefore aver that the policy was the standard form of policy required by the Acts of Assembly of the State of Pennsylvania, to wit, the Act of May 17, 1921, P. L. 682, Article V, Section 523, and contained all of the standard provisions in said statute set forth. Plaintiffs are informed, believe it to be true and therefore aver that Exhibit "A" attached to this Statement of Claim and made part hereof is a true and correct copy of this standard form of policy, and of the standard provisions of the policy issued by defendant as aforesaid.

[fol. 38] 7. It is averred that the assured under the policy aforesaid, and so stated and denominated in the policy, was the Glenwood Industrial Distilling Company, and that the building insured against fire under the policy aforesaid, and in said policy described, (as has been stated, plaintiffs cannot set forth a copy of said description because the policy is in the hands of defendant) is the one situate on Cedar Street and Tioga Street, in the City of Philadelphia. Plaintiffs are informed, believe it to be true and therefore aver that in addition to the standard provisions hereinbefore referred to the policy contained the special provisions set forth in Exhibit "B" hereto at-

tached and made part of this Statement of Claim, and that plaintiffs believe Exhibit "B" to be a true and correct copy of such special provisions. Plaintiffs are informed that there are other special provisions which they do not recollect and which cannot be set forth as copy because they are in the hands of defendant, as has been hereinbefore set forth.

8. The interest of the plaintiff, John M. Kennedy, 3rd, in the premises hereinbefore referred to was that of mortgagee in that the said John M. Kennedy, 3rd, held a mortgage which constituted a first lien on the building and property referred to in the principal sum of $25,000, which mortgage was recorded at Philadelphia, in Mortgage Book, J. M. H. No. 2288, page 352, &c.

9. In the late hours of March 24, 1932, or in the early hours of March 25, 1932, a fire broke out at said premises and completely destroyed the same.

10. Plaintiffs are informed, believe it to be true and therefore aver that the fire and the loss or damage result-
[fol. 39] ing therefrom was not caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at or after the fire.

11. On, to wit, the 28th day of March, 1932, the use plaintiff, Anna L. Bogash, by her attorney in fact, Harry Bogash, notified and advised defendant of said fire and loss, a true and correct copy of which notice is hereto attached, marked Exhibit "C" and made part hereof.

12. Plaintiffs aver that they have performed all things on their part to be performed in connection with the loss due and payable under the policy of insurance aforesaid.

13. Plaintiffs aver that defendant has broken its covenant on its part to be performed, as set forth in the policy, and has refused to pay the amount called for by said policy or any part thereof, but on the contrary, to wit, on the 17th day of May, 1932, through its manager, H. W. Stevenson, informed plaintiffs that they would not make payment under said policy and has repudiated the same and has in-

formed plaintiffs that they were in no way liable under said policy.

14. Plaintiffs aver that the total insurance outstanding on said buildings at the time of the fire was as follows, to wit:

The Liverpool & London & Globe Ins. Co., Ltd.	$5,000.00
The Springfield Fire & Marine Ins. Co.	5,000.00
[fol. 40] Connecticut Fire Ins. Co.	2,500.00
Ætna Insurance Co.	5,000.00
	$17,500.00

15. Plaintiffs are informed, believe it to be true and therefore aver that the value of the buildings destroyed by fire as aforesaid was in excess of $20,000.00.

Wherefore, Plaintiffs claim there is now justly due and owing to them by defendant the sum of $5,000.00 with interest from May 25, 1932.

Harry Shapiro, Attorney for Plaintiffs.

Duly sworn to by Anna L. Bogash. Jurat omitted in printing.

[fol. 41] For Exhibit "A" to statement of claim (Policy of Insurance) see Bill of Exceptions—side folio 84.

EXHIBIT "B" TO STATEMENT OF CLAIM

Loss or damage, if any, under this policy, shall be payable to John M. Kennedy, 3rd, as mortgagee (or trustee), as interest may appear, and this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; Provided, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same.

Provided also, that the mortgagee (or trustee) shall notify this company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee) and, unless permitted by this policy, it shall be noted thereon, and the mortgagee (or trustee) shall on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void.

This company reserves the right to cancel this policy at any time as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice of the [fol. 42] mortgagee (or trustee) of such cancellation and shall then cease, and this company shall have the right, on like notice, to cancel this agreement.

Whenever this company shall pay the mortgagee (or trustee) any sum for loss or damage under this policy and shall claim that, as to the mortgagor or owner, no liability therefor existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may, at its option, pay the mortgagee (or trustee) the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of its claim.

Permission is granted to carry additional insurance in any other company.

Non-occupancy is hereby permitted for any and every term.

EXHIBIT "C" TO STATEMENT OF CLAIM

March 28, 1932.

The Liverpool & London & Globe Ins. Co., 5th & Walnut Streets, Philadelphia, Pa.

GENTLEMEN:

I represent Anna L. Gogash, to whom John M. Kennedy, 3rd, assigned his right and interest to a certain fire loss occurring to the property of the Glenwood Industrial Distilling Co. situate on Cedar Street and Tioga Street. I under-

[fol. 43] stand that on July 17, 1931, you issued a policy under No. L331072 in favor of the Glenwood Industrial Distilling Co., as owner and John M. Kennedy, 3rd, mortgagee, covering the aforesaid property, for the period of one year from the aforesaid date in the sum of $5,000.00.

I wish to inform you that a fire broke out on said premises of the Glenwood Industrial Distilling Co. in the late hours of March 24th, 1932, or the early hours of March 25th, 1932, causing complete destruction of the said property. I shall appreciate your sending me your customary form or proof of loss to be filed in such matters.

Yours very truly, Harry J. Bogash.

HJB:EBNA.

Registered, Return Receipt Requested.

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF DEFENSE No. 17098—Filed October 10, 1932

STATE OF NEW YORK,
County of New York, ss:

C. A. Nottingham, being duly sworn according to law, deposes and says that he is Ass. United States Fire Manager of The Liverpool and London and Globe Insurance Company, Ltd., the defendant above named; that said defendant company is a corporation of the Kingdom of Great Britain with its executive offices located in Liverpool, England, where its executive officers reside; that its said executive officers have no knowledge whatever of the facts in this case, and there is not sufficient time to inform them in order that an executive officer may execute this affidavit of defense; that the facts in this case are within the knowledge of [fol. 44] the deponent, and his duties require him to have knowledge of the same; that he is duly authorized to make this affidavit on behalf of the defendant company from information received from competent persons duly authorized by the defendant company to investigate the alleged loss; and that the defendant has a full, just, true and legal defense to the whole of the plaintiff's claim of the following nature and character:

1. Admitted.

2. Admitted.

3. The means of proof of the facts alleged in the third paragraph of the plaintiffs' statement of claim are within the exclusive control of the plaintiffs and therefore defendant demands proof thereof, if material, at the time of the trial in accordance with the provisions of the Act of June 12, 1931, P. L. 557.

4. Admitted.

5. Defendant admits that on or about July 17, 1931, in consideration of the stipulations mentioned and of the premium therein set forth, it issued, executed, and delivered its certain policy of insurance No. L-331072 and that said policy is now in the possession of the defendant, a copy thereof being hereto attached and made part of this affidavit of defense. Defendant denies that said policy was issued to and on behalf of the plaintiffs; that defendant wrongfully possessed itself of said policy without any right so to do, and denies that it possessed itself of said policy without any authority from or consent by the plaintiff; but on the contrary defendant avers that it came into possession of the said policy under the circumstances hereinafter set forth [fol. 45] and that delivery was made with the knowledge and consent of the plaintiff prior to the time that the said plaintiff made any assignment of any kind or character to the use plaintiff, and as a consequence the defendant avers that it is not required to furnish a copy of the said policy to the use plaintiff and for the reasons in this affidavit of defense stated admits that it refused so to do.

5 (a) For further answer to paragraph 5 of the plaintiffs' statement of claim defendant avers that its aforesaid policy was executed, issued, and delivered to the Corn Exchange National Bank and Trust Company, which held and was the owner of a certain mortgage secured upon the premises intended to be covered by the policy of insurance so issued, and that said policy was issued, executed, and delivered at the special instance and request of the said Corn Exchange National Bank and Trust Company; that the premium for said policy was paid by the said Corn Exchange National Bank and Trust Company and that said policy was paid by the said Corn Exchange National Bank and Trust Company and that said policy was procured by it for the sole purpose of protecting its interest in the premises intended to be insured as second mortgagee.

5 (b) Defendant further avers that at the time the said Corn Exchange National Bank and Trust Company made application for and secured said policy of insurance, the legal title to the said premises was in the Glenwood Industrial Distilling Company and for that reason, and in accordance with the Acts of Assembly of the State of Pennsylvania in such case made and provided, said policy was written in favor of the Glenwood Industrial Distilling Company as the assured to which was attached a mortgagee [fol. 46] clause whereby loss or damage was made payable under said policy to John M. Kennedy, 3d, mortgagee or trustee, as his interest may appear. Defendant avers, however, that said policy contained the following provision:

"It is understood that the buildings insured hereunder are now under foreclosure proceedings by the Corn Exchange National Bank & Trust Co. The premium being paid by the Corn Exchange National Bank & Trust Co., it is agreed that in even- of loss, same will be adjusted with the Corn Exchange National Bank & Trust Co., and paid to them and John M. Kennedy, 3rd, Mortgagee, as interest may appear."

Defendant is advised by counsel, believes, and therefore avers that by virtue of the quoted provision the said Corn Exchange National Bank and Trust Company was in law the assured under the said policy; that said policy was primarily for the benefit of the said bank and trust company; that the said Glenwood Industrial Distilling Company had no knowledge of the issuance of the said policy, paid none of the premium therefor, and never at any time ratified the said contract after its issuance, and therefore any loss or damage accruing under the said policy would in law be payable to the said bank and trust company.

5 (c) Defendant further avers that the whole of the premium for the said policy was paid by the said Corn Exchange National Bank and Trust Company and that no consideration for the issuance of the said policy moved from the said John M. Kennedy, 3rd, the legal plaintiff.

5 (d) Defendant further avers that possession of said policy after its issue was retained by the said Corn Exchange National Bank and Trust Company from the date [fol. 47] of its issuance up to and including the 17th day of January, 1932, when said policy was surrendered by

said bank and trust company with the knowledge and consent of John M. Kennedy, 3rd, to the defendant for cancellation, on which said date said policy was cancelled and the unearned premium for the unexpired term was repaid to and received by the Corn Exchange National Bank and Trust Company, wherefore and whereby the said policy of insurance, which is the basis of this communication was not in force at the time of the alleged loss averred in the plaintiff's statement of claim.

6. Admitted, except that "Exhibit A" attached to the plaintiff's statement of claim is not a true and correct copy of the said policy because it does not contain the clause quoted in paragraph 5 (b) hereof, to which reference is hereby made as though fully incorporated herein.

7. Denied. Defendant avers that its said policy contains other special provisions than those contained in "Exhibit A" and "Exhibit B" attached to plaintiff's statement of claim as by reference to a true and correct copy of said policy hereto attached and made part of this affidavit of defense more fully and at large appears. It is further averred that the Corn Exchange National Bank and Trust Company, by reason of the circumstances hereinbefore set forth, was the actual assured under the terms and conditions of the said contract, and not the Glenwood Industrial Distilling Company. It is further averred that the property described in and intended to be insured by the said policy was not situate on Cedar Street and Tioga Street as averred in the plaintiff's statement of claim, but was situate as stated in the said policy on the north side of [fol. 48] Cedar Street about two hundred feet north of Tioga Street. It is further averred that the said policy did not contain the provisions of the last paragraph of plaintiff's "Exhibit B" attached to the statement of claim with reference to the non-occupancy being permitted for each and every term.

8. Denied. It is averred that the mortgage held by the said John M. Kennedy, 3rd, was not a first lien on the building and property described in the policy of insurance which is the basis of this suit inasmuch as the property on which said mortgage was a first lien is described in the mortgage as follows:

"All that certain lot or piece of ground with buildings and improvements thereon erected; Situate on the southeast

side of Cedar Street (50 feet wide) at the distance of 195 feet northeastward from the northeast side of Tioga Street (60 feet wide) in the 45th Ward of the said City of Philadelphia

"Containing a front or breadth on said Cedar Street 92 feet and extending of that width in length or depth southeastward between lines parallel with Venango Street 167 feet 9⅜ inches to the middle of a certain railroad track."

9. It is denied that the premises described in the policy of insurance which is the basis for this action were destroyed by fire. It is admitted that property of the Glenwood Industrial Distilling Company was partially damaged by fire at or about the time mentioned.

10. The means of proof of the facts alleged in the tenth paragraph of the plaintiffs' statement of claim are exclusively within the control of the plaintiffs and therefore defendant demands proof thereof, if material, at the time of the trial, in accordance with the provisions of the [fol. 49] Act of Assembly of June 12, 1931, P. L. 557.

11. Denied. It is averred that the notice attached to plaintiff's statement of claim as "Exhibit C" did not refer to the policy of insurance which is the basis of this suit and did not notify defendant that a fire and loss had occurred to the property described in said policy or that the use plaintiff claimed any interest in that property.

12. The averments of paragraph 12 are denied for the reasons hereinbefore set forth.

13. Defendant denies that it has broken its covenant on its part to be performed as set forth in the policy of insurance which is the basis for this suit. It admits that it has refused to pay the amount in which said policy was issued or any part thereof and admits that it notified the plaintiffs that it would make no payment under the terms of the said policy by reason of the fact that said policy had been cancelled prior to the said loss and was not in force and effect when the alleged loss occurred.

14. Denied. It is averred that the insurance mentioned in paragraph 14 of the plaintiffs' statement of claim was not on the buildings alleged to have been damaged and/or destroyed by the fire mentioned in the said plaintiffs' statement of claim.

15. Defendant avers that means of proof of the facts alleged in paragraph 15 of the plaintiffs' statement of claim are within the exclusive control of the plaintiffs and proof thereof, if material, is demanded at the time of the trial in accordance with the Act of Assembly of June 12, 1931, P. L. 557.

[fol. 50] Defendant denies that it has any liability for any part of the value of said buildings by reason of the facts in this affidavit of defense set forth.

All of which facts deponent avers to be true and expects to be able to prove at the time of the trial.

C. A. Nottingham, Asst. United States Fire Manager.

Sworn to and subscribed before me this sixth day of October, A. D. 1932. Leona E. Martin, Notary Public. New York County. N. Y. Co. Clerk's No. 40, Reg. No. 3-M-635. Commission expires March 30, 1933. (Seal.)

Notarial certificate attached.

For Exhibit "A" to Affidavit of Defense (Policy of Insurance) see Bill of Exceptions—Side folio 84.

IN UNITED STATES DISTRICT COURT

Bill of Exceptions—Filed March 1, 1935

Be It Remembered, That in the said term of this Court came the said plaintiff into the said Court, and impleaded the said defendant in a certain plea of assumpsit, etc., in which the said plaintiff declared (prout narr.) and the said defendant pleaded (prout pleas). And thereupon issue was joined between them.

[fol. 51] And afterwards, to wit: at a session of said Court, held at the District aforesaid, before the Honorable Oliver B. Dickinson, Judge of the said Court, the seven-

teenth day of April, A. D. 1934, the aforesaid issue between the said parties came to be tried by a jury of the said District for that purpose duly impanelled (prout list of jurors), at which day came as well the said plaintiff as the said defendant by their respective attorneys; and the jurors of the jury aforesaid impanelled to try the said issue, being also called, came and were then and there in due manner chosen and sworn or affirmed, to try the said issue; and upon the trial the counsel for the said respective parties offered their evidence as particularly set forth in the following stenographic notes of testimony, and the Stenographer's Minutes attached hereto; and the evidence in the cause being closed, the learned Trial Judge charged the Jury and affirmed and refused to affirm points presented on behalf of the plaintiff and on behalf of the defendant, as hereinafter set forth and as follows:

[fol. 52] [Titles omitted]

Before Hon. Oliver B. Dickinson, J., and a Jury

[fol. 53] Philadelphia, Pa., Tuesday, April 17, 1934, at 10:00 o'clock a. m.

Present:

Harry Shapiro, Esq., for the plaintiff;
Horace Michener Schell, Esq., and Harry S. Ambler, Jr., Esq., for the defendants.

Transcript of the Testimony, Rulings, Exceptions, and Charge of the Court

Mr. Shapiro: I understand that these three cases are to be tried together by agreement of counsel, with the consent of your Honor; is that correct?

Mr. Ambler: Yes.

Mr. Shapiro: I ask, your Honor, that the jury be sworn in all three cases.

The Court: Let the jury be sworn then in all three cases.

(The jury was thereupon sworn or affirmed April 17, 1934.)

Evidence on Behalf of the Plaintiff

Offers in Evidence

Mr. Shapiro: If your Honor pleases, I offer in evidence paragraphs 1 and 2 of the Statements of Claim, which are

the descriptive paragraphs of the plaintiff and the defendant, and when I say "paragraphs" I mean the paragraphs of each of the Statements of Claim, because they are the same Statements of Claim generally.

[fol. 54] I offer in evidence paragraph 4 of the Statements of Claim, paragraphs 1, 2, and 4 being admitted in the answers.

I offer in evidence so much of paragraph 5 of the Statements of Claim, which alleges the execution, delivery and making of the contract of insurance, because that is admitted in the answers.

Now, with regard to paragraph 8 of the Statements of Claim, I offer that in evidence upon the ground that the alleged answers do not amount to a sufficient denial in accordance with our practice.

I offer in evidence so much of paragraph 9 of the Statements of Claim that alleges that the property was totally destroyed, on the ground of the insufficiency of the denial as to the extent of the destruction averred.

Mr. Ambler: Objected to.

The Court: Paragraph 9 of the Statements of Claim and the correspondingly numbered paragraphs in the Affidavit of Defense establish as a fact in the case not that the premises described in the policy of insurance were destroyed by fire, but that the property of the Glenwood Industrial Distilling Company was damaged by fire.

(Exception noted for plaintiff by direction of the Court.)

Mr. Shapiro: Paragraph 15, though in one of the Statements numbered 16, is offered in evidence, so much of it as avers the value of the building destroyed by fire, upon the ground that the answers to the corresponding paragraph numbered 15 in one of the affidavits of defense, numbered 16 in the others dealing with the same matter, do not sufficiently deny the value of the building destroyed by fire.

Mr. Ambler: That is objected to.

[fol. 55] The Court: The trouble about that is that the averment in the Statements of Claim does not sufficiently allege the value either. It does not show what the value was.

(Offer withdrawn.)

Mr. Shapiro: If the Court pleases, in order to save a great deal of time on the question of proof of the damage loss,

it is agreed between the parties that the verdict in this case is limited to $11,000, and that any verdict, if there is a verdict, shall be based upon that loss of $11,000.

Mr. Schell: That is so, sir, with the additional statement that there is one other policy of insurance involved, your Honor, in this court, and it would have to pay its pro rata share, so that any verdict here would be on the basis of $17,500 of insurance apportioned to the three policies on trial.

The Court: As I understand it, all you have stipulated as far as this jury is concerned, you relieve them from finding what the money damage from the fire is and agree that the property damage was $11,000?

Mr. Shapiro: We can further agree that——

The Court: We can whip all the rest of it in shape later.

Mr. Shapiro: I mean that I am perfectly satisfied, and I have made an agreement with Mr. Ambler, that whatever verdict is found here will apply to the other policy also.

The Court: The jury may find that it had a value of $11,000 without any evidence.

Mr. Schell: The only reason that I made the suggestion here was that I supposed your Honor was going to take a verdict against each company.

[fol. 56] The Court: We can translate it in the terms of a verdict later on.

Mr. Schell: I thought your Honor wanted to know the facts; that's all.

The Court: That is all right, and I appreciate it, but what I mean so far as this jury is concerned, they are relieved from the trouble of finding what the damaged property was worth, it being agreed that it was worth $11,000.

Mr. Shapiro: I offer in evidence, if your Honor pleases, the original policy of fire insurance issued to the Glenwood Industrial Distilling Company as assured and others mentioned in the policy by the Ætna Insurance Company of Hartford, Connecticut, dated July 17, 1932.

(Policy in question marked Plaintiff's Exhibit 1. The said exhibit reads as follows:

PL'T'FFS' EXHIBIT 1

"Standard Fire Insurance Policy of The State of Pennsylvania

Expires, July 17, 1932.
Property, N. s. Cedar St. North of Tioga St.
Am't, $5000—Premium $130.50.
Tabulated Mar. 11, 1932.

Glenwood Industrial Distilling Co.

No. 22611

Ætna Insurance Co., Hartford, Conn.

More Than a Century of Service—

Incorporated 1819

Charter Perpetual. Capital $7,500,000.

Dennis J. Sweeny & Company, Agents,

333 Walnut Street, Philadelphia, Penna.

It is important that the written portions of all Policies [fol. 57] covering the same property read exactly alike. If they do not they should be made uniform at once.

Form H 117. Edition January, 1916.

No. 22611

Ætna Insurance Company,

Hartford, Conn.

Incorporated in 1819

Amount, $5000; Rate 2.61 Premium, $130.50.

In Consideration of the Stipulations Herein Named and of One Hundred Thirty & 50/100 • • • Dollars Premium Does Insure Glenwood Industrial Distilling Co. and legal representatives to the extent of the actual cash value (ascertained with proper deductions for depreciation) of the property at the time of loss or damage, but not exceeding the amount which it would cost to repair or replace the same with material of like kind and quality within a reasonable time after such loss or damage, without allowance for

any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair and without compensation for loss resulting from interruption of business or manufacture, for the term of One Year from the 17th day of July, 1931, at noon, to the 17th day of July, 1932, at noon, against all direct loss and damage by fire, and by removal from premises endangered by fire, except as herein provided, to an amount not exceeding Five Thousand Dollars, to the following described property while located and contained as described herein, or pro rata for five days at each proper place to which any of the property shall [fol. 58] necessarily be removed for preservation from fire, but not elsewhere, namely:

On- Brick Building, with additions and extensions thereto, to include fire escapes, fire extinguishing apparatus, elevators and attachments, dumb waiters and appurtenances, heating and lighting apparatus, dynamos and motors and appurtenances thereof, wiring, permanent partitions, piping, plumbing, wall paper, permanent decorations, gas and electric fixtures and all permanent fixtures, but excluding excavations and foundations below the ground or street level, occupied for distilling ethyl alcohol and/or other purposes not more hazardous.

situate on North side of Cedar Street about 200′ North of Tioga Street, Philadelphia, Pa.

Loss, if any, payable to John M. Kennedy, 3rd., Mortgagee.

In addition to the privilege contained in the printed conditions of this Policy, permission is hereby given to make ordinary alterations and repairs in the within-described premises, but this shall not be held to include the reconstruction or the enlargement of the same, and this Policy (so far as it applies on buildings) shall also cover in accordance with the conditions of this Policy, all materials and supplies therefor, therein or adjacent, and such alterations.

Other insurance permitted without notice until required.
Privilege for existing communications.

Electric Current Permit

Permission is granted under this Policy for the use of Electric Current after Certificate of approval has been is-

sued by the Philadelphia Fire Underwriters' Association and while it remains unrevoked by said Association.

[fol. 59] Reduced Rate Average Clause

In consideration of the reduced rate and/or form under which this Policy is written, it is expressly stipulated and made a condition of this contract that in the event of loss this Company shall be liable for no greater proportion thereof than the amount hereby insured bears to eighty per cent (80%) of the actual cash value of the property described herein at the time when such loss shall happen, nor for more than the proportion which this Policy bears to the total insurance thereon.

In the event that the aggregate claim for any loss is both less than ten thousand dolars ($10,000), and less than five per cent (5%) of the total amount of insurance upon property described herein at the time such loss occurs, no special inventory or appraisement of the undamaged property shall be required.

If this Policy be divided into two or more items, the foregoing shall apply to each item separately.

Light-ing Clause and Electrical Apparatus Clause Excluding damage to Dynamos and Other Electrical Apparatus

This Policy also covers direct loss or damage to the property insured by lightning (meaning thereby the commonly accepted use of the term 'lightning,' and in no case to include loss or damage by cyclone, tornado or wind-storm) whether fire ensues or not; it being made a condition of this contract that any loss or damage to dynamos, exciters, lamps, switches, motors or other electrical appliances or devices, such as may be caused by lightning or other electrical currents, artificial or natural, is expressly excluded, unless fire ensues, and then this Company is liable only for such [fol. 60] loss or damage to them as may be caused by such ensuing fire. It is also a condition of this contract that if there is other insurance upon the property damaged this Company shall be liable only for such proportion of any direct loss or damage by lightning (except as above stated) as the amount hereby insured bears to the whole amount insured thereon whether such other insurance contains a similar clause or not.

Attached to and forming part of Policy No. 22611 of the Ætna Insurance Company, Hartford, Connecticut.

Dennis J. Sweeny & Co.
Insurance
333 Walnut Street, Philadelphia, Penna.

Form H 1862 9-30-2M (25)

Dennis J. Sweeny & Co. Agents,
by R. D. Sweeny Secy.

It is understood that the buildings insured hereunder are now under foreclosure proceedings by the Corn Exchange National Bank & Trust Co. The premium being paid by the Corn Exchange National Bank & Trust Co. it is agreed that in event of loss, same will be adjusted with the Corn Exchange National Bank & Trust Co. and paid to them and John M. Kennedy, 3rd, Mortgagee, as interest may appear.

Standard Mortgagee Clause

Loss or damage, if any, under this Policy, shall be payable to John M. Kennedy, 3rd, as mortgagee, (or trustee) as interest may appear, and this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within-described property, nor by any foreclosure or other proceedings, or notice of sale relating to [fol. 61] the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this Policy; Provided, that in case the mortgagor or owner shall neglect to pay any premium due under this Policy, the mortgagee (or trustee) shall, on demand, pay the same.

Provided also that the mortgagee (or trustee) shall notify this Company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee) and, unless permitted by this Policy, it shall be noted thereon and the mortgagee (or trustee) shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this Policy shall be null and void.

This Company reserves the right to cancel this Policy at any time as provided by its terms, but in such case this Policy shall continue in force for the benefit only of the

mortgagee (or trustee) for ten days after notice to the mortgagee (or trustee) of such cancellation and shall then cease, and this Company shall have the right, on like notice, to cancel this agreement.

Whenever this Company shall pay the mortgagee (or trustee) any sum for loss or damage under this Policy and shall claim that, as to the mortgagor or owner, no liability therefor existed, this Company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may at its option, pay the mortgagee (or trustee) the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of [fol. 62] the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of his claim.

Attached to and forming part of Policy No. 22611 of the Ætna Insurance Company, Hartford, Conn.

Dennis J. Sweeny & Co.
Insurance
333 Walnut St., Philadelphia, Penna.
Form H 1500 12-28 1M

Dennis J. Sweeny & Co., Agents,
by R. D. Sweeny, Secy.

This Policy is made and accepted subject to the foregoing stipulations and conditions, and to the stipulations and conditions printed on the back hereof, which are hereby made a part of this Policy, together with such other provisions, stipulations and conditions as may be endorsed hereon or added hereto as herein provided.

In Witness Whereof, this Company has executed and attested these presents; but this Policy shall not be valid unless countersigned by the duly authorized Agent of the Company at Philadelphia, Penna.

Ralph B. Ives, President. J. R. Stewart, Secretary.

Countersigned this 4th day of August, 1931.
Dennis J. Sweeny & Co., Agents, by R. D. Sweeny, Secy.

Fraud, misrepresentation, etc. This entire policy shall be void if the insured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

Property uninsurable and excepted. This policy shall not cover accounts, bills, currency, deeds, evidences of debt, money notes, or securities; nor, unless specifically named hereon in writing; bullion, manuscripts, mechanical drawings, dies, or patterns.

Hazards not covered This Company shall not be liable for loss or damage caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire, or when the property is endangered by fire in neighboring premises.

This entire policy shall be void, unless otherwise provided by agreement in writing added hereto,—

Ownership, etc. (a) if the interest of the insured be other than unconditional and sole ownership; or (b) if the subject of insurance be a building on ground not owned by the insured in fee simple; or (c) if, with the knowledge of the insured, foreclosure proceedings be commenced, or notice given of sale of any property insured hereunder, by reason of any mortgage or trust deed; or (d) if any change other than by the death of an insured take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard); or (e) if this policy be assigned before a loss.

Unless otherwise provided by agreement in writing added hereto, this Company shall not be liable for loss or damage occurring,—

Other insurance (a) while the insured shall have any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or

Increase of hazard. (b) while the hazard is increased by any means within the control of the insured; or

Repairs, etc. (c) while mechanics are employed in building, altering, or repairing the described premises beyond a period of fifteen days; or

Explosives, gas, etc. (d) while illuminating gas or vapor is generated on the described premises; or while (any usage or custom to the contrary notwithstanding) there is kept, used, or allowed on the described premises fireworks, greek fire, phosphorus, explosives, benzine, gasoline, naphtha, or any other petroleum product of greater inflammability than kerosene oil, gunpowder exceeding twenty-five pounds, or kerosene oil exceeding five barrels; or

Factories. (e) if the subject of insurance be a manufacturing establishment, while operated in whole or in part between the hours of ten P. M. and five A. M., or whle it ceases to be operated beyond a period of ten days; or

Unoccupancy. (f) while a described building whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of ten days; or

Explosion, lightning. (g) by explosion or lightning, unless fire ensue, and in that event for loss or damage by fire only.

Chattel mortgage. Unless otherwise provided by agreement in writing added hereto, this Company shall not be liable for loss or damage to any property insured hereunder while incumbered by a chattel mortgage, and during the time of such incumbrance this Company shall be liable only for loss or damage to any other property insured hereunder.

Fall of building. If a building or any material part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

Added clauses. The extent of the application of insurance under this policy, and of the contribution to be made by this Company in case of loss or damage, and any other agreement not inconsistent with or a waiver of any of the conditions or provisions of this policy, may be provided for by agreement in writing added thereto.

Waiver. No one shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement added thereto; nor shall any such provision or condition be held to be waived unless such waiver shall be in writing added hereto; nor shall any provision or condition of this policy, or any forfeiture, be held to be waived by any requirement, act, or proceeding, on the part of this Company relating to appraisal or to any

examination herein provided for; nor shall any privilege or permission affecting the insurance hereunder exist or be claimed by the insured unless granted herein or by rider added hereto.

Cancellation of policy. This policy shall be cancelled at any time at the request of the insured; in which case the Company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time. This policy may be cancelled at any time by the Company, by giving to the insured a five days' written notice of cancellation, with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium (if ~~not~~ tendered) will be refunded on demand.

Pro rata liability. This Company shall not be liable for a greater proportion of any loss or damage than the amount hereby insured shall bear to the whole insurance covering the property, whether valid or not, and whether collectible or not.

Noon. The word "noon" herein means noon of standard time at the place of loss or damage.

Mortgage interests. If loss or damage is made payable, in whole or in part, to a mortgagee not named herein as the insured this policy may be cancelled as to such interest by giving to such mortgagee a ten days' written notice of cancellation. Upon failure of the insured to render proof of loss, such mortgagee shall, as if named as insured hereunder, but within sixty days after such failure, render proof of loss, and shall be subject to the provisions hereof as to appraisal and time of payment and of bringing suit. On payment to such mortgagee of any sum for loss or damage hereunder, if this Company shall claim that as to the mortgagor or owner no liability existed, it shall, to the extent of such payment, be subrogated to the mortgagee's right to recovery and claim upon the collateral to the mortgage debt, but without impairing the mortgagee's right to sue, or it may pay the mortgage debt and require an assignment thereof and of the mortgage; other provisions relating to the interests and obligations of such mortgagee may be added hereto by agreement in writing.

66 Plaintiff's Exhibit 1 (Policy No. 22611).

Requirements in case of loss. The insured shall give immediate notice in writing to this Company of any loss or damage, protect the property from further damages, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, stating the quantity and cost of each article and the amount claimed thereon; and **the insured shall, within sixty days after the fire, unless such time is extended in writing by this Company, render to this Company a proof of loss,** signed and sworn to by the insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss or damage thereto; all incumbrances thereon; all other contracts of insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; and by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged. The insured as often as may be reasonably required shall exhibit to any person designated by this Company all that remains of any property herein described, and submit to examinations, under oath, by any person named by this Company, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof, if originals be lost, at such reasonable time and place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made.

Appraisal. In case the insured and this Company shall fail to agree as to the amount of loss or damage, each shall, on the written demand of either, select a competent and disinterested appraiser. The appraisers shall first select a competent and disintersted umpire, and, failing for fifteen days to agree upon such umpire, then, on request of the insured or this Company, such umpire shall be elected by a judge of a court of record in the county in which the property insured is located. The appraisers shall then appraise the loss and

damage, stating separately sound value and loss or damage to each item, and, failing to agree, shall submit their differences only to the umpire. An award in writing, so itemized, of any two, when filed with this Company, shall determine the amount of sound value and loss or damage. Each appraiser shall be paid by the party selecting him, and the expenses of appraisal and umpire shall be paid by the parties equally.

Company's options. It shall be optional with this Company to take all or any part of the articles at the agreed or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality, within a reasonable time, giving notice of its intention so to do prior to thirty days after ascertainment of loss or damage is made, as herein provided.

Abandonment. There can be no abandonment to this Company of any property.

When loss payable. The amount of loss or damage for which this Company may be liable shall be payable sixty days after proof of loss as herein provided is received by this Company, and ascertainment of the loss or damage is made, either by agreement between the insured and this Company expressed in writing or by the filing with this Company of an award as herein provided.

Suit. No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless the claimant shall show compliance wtih all the requirements of this policy, nor unless commenced within twelve months next after the fire.

Subrogation. This Company may require from the insured an assignment of all right of recovery against any party far loss or damage to the extent that payment therefor is made by this Company.

68 Plaintiff's Exhibit 1 (Policy No. 22611).

ASSIGNMENT OF INTEREST BY INSURED.

The interest of as owner of property covered by this Policy is hereby assigned to subject to the consent of the Aetna Insurance Company, Hartford, Connecticut.

.....
(Signature of the Insured)

Dated

NOTE.—To secure Mortgagees, if desired, the Policy should be made payable on its face to such Mortgagee, as follows: Loss, if any, payable to John Doe, Mortgagee.

CONSENT BY COMPANY TO Assignment of Interest

The Aetna Insurance Company, Hartford, Connecticut, hereby consents that the interest of as owner of the property covered by this Policy be assigned to

.....Agent

Dated.....

RECEIPT FOR RETURN PREMIUM

Year Month Day

Date of Cancellation,
" Policy
Time in Force,
Premium Paid $
" Earned at .... rate $

" Returned, $
IF PRO RATA, STATE REASON WHY.

[fol. 69] NOTE.—A Receipt should be taken for Return Premiums in all Cancellations and signed by the Assured.

Ætna Insurance Company, Hartford, Connecticut

—— —, 19—.

In Consideration of — Dollars Return Premium, the Receipt of which is hereby acknowledged, this Policy is hereby canceled and surrendered to the Company.

—— ——, Assured.

Voucher for Partial Loss

Received of the Ætna Insurance Company, Hartford, Conn., through —— ——, agent at ——, — Dollars, being in full satisfaction of all claims and demands against the said Company, for loss and damage by fire, which occurred on the — day of ——, 19—, to property insured under this Policy, and in consideration of this payment said Policy is hereby reduced that amount, leaving in force the sum of $—.

Dated —— —, 19—.

—— ——.

(Rubberstamp:) Ætna Ins. Co. Received Feb. 27, 1932. X Ans'd. —.")

Mr. Shapiro: I also offer in evidence Policy issued the same date by the Springfield Fire & Marine Insurance Company of Springfield, Massachusetts.

[fol. 70] (Policy in question marked Plaintiff's Exhibit 2. The said exhibit reads as follows:

PL'T'FF'S EXHIBIT 2

"Standard Fire Insurance Policy of the State of Pennsylvania

Philadelphia, Pa.

Expires July 17th, 1932.
Property, N. s. Cedar St., N. of Tioga.
Amount, $5000.
Premium, $130.50.

Glenwood Industrial Distilling Co.
No. 25322

Received Mar. 7, 1932. Canceled.

5—753-754-755

Springfield Fire & Marine Insurance Company of Springfield, Massachusetts

Cash Capital $5,000,000.00

Dennis J. Sweeny & Co., Agents,

333 Walnut Street

Bell—Lombard 2325.
3400.

Philadelphia

Keystone—Main 5875.

It is important that the written portions of all Policies covering the same property read exactly alike. If they do not they should be made uniform at once.

Printed in U. S. A. 9–1930–30M.

No. 24322

Springfield Fire & Marine Insurance Company of Springfield, Massachusetts

Stock Company. Incorporated 1849.
Amount $5000 Rate 2.61 Premium $130.50
Old Pol. No. —.

[fol. 71] In Consideration of the Stipulations Herein Named and of One Hundred Thirty & 50/100 • • • Dollars Premium does insure Glenwood Industrial Distilling Co. and legal representatives to the extent of the actual cash value (ascertained with proper deductions for depreciation) of the property at the time of loss or damage, but not exceeding the amount which it would cost to repair or replace the same with material of like kind and quality within a reasonable time after such loss or damage, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair and without compensation for loss resulting from interruption of business or manufacture, for the term of One Year from the 17th day of July 1931, at noon to the 17th day of July 1932, at noon, against all direct loss and damage by fire, and by removal from premises endangered by fire except as herein provided, to an amount not exceeding Five Thousand Dollars to the following described prop-

erty while located and contained as described herein, or pro-rata for five days at each proper place to which any of the property shall necessarily be removed for preservation from fire, but not elsewhere, namely:

Building.

Springfield Fire & Marine Insurance Company,
Springfield, Massachusetts

On Brick Building, with additions, extensions and attachments thereto, to include fire escapes, fire extinguishing apparatus, elevators and attachments, dumb waiters and [fol. 72] appurtenances, heating and lighting apparatus, dynamos and motors and appurtenances thereof, wiring, permanent partitions, piping, plumbing, wall paper, permanent decorations, gas and electric fixtures and all permanent fixtures, but excluding excavations and foundations below the ground or street level, occupied for distilling ethyl alcohol and/or other purposes not more hazardous situate on North side of Cedar Street about 200′ North of Tioga Street, Philadelphia, Pa. Loss, if any, payable to John M. Kennedy, 3rd, Mortgagee.

In addition to the privilege contained in the printed conditions of this Policy, permission is hereby given to make ordinary alterations and repairs in the within-described premises, but this shall not be held to include the reconstruction or the enlargement of the same, and this Policy (so far as it applies on buildings) shall also cover in accordance with the conditions of this Policy, all materials and supplies therefor, therein or adjacent, and such alterations.

Other insurance permitted without notice, until required.

Privilege for existing communications.

Electric Current Permit

Permission is granted under this Policy for the use of Electric Current after Certificate of approval has been issued by the Philadelphia Fire Underwriters' Association and while it remains unrevoked by said Association.

Reduced Rate Average Clause

In consideration of the reduced rate and/or form under which the Policy is written, it is expressly stipulated and made a condition of this contract that in the event of loss [fol. 73] this Company shall be liable for no greater proportion thereof than the amount hereby insured bears to

eighty (80) per cent. of the actual cash value of the property described herein at the time when such loss shall happen, nor for more than the proportion which this Policy bears to the total insurance thereon.

In the event that the aggregate claim for any loss is both less than ten thousand (10,000) dollars, and less than five (5) per cent. of the total amount of insurance upon property described herein at the time such loss occurs, no special inventory or appraisement of the undamaged property shall be required.

If this Policy be divided into two or more items, the foregoing shall apply to each item separately.

Lightning Clause and Electrical Apparatus Clause

Excluding Damage to Dynamos and Other Electrical Apparatus

This Policy also covers direct loss or damage to the property insured by lightning (meaning thereby the commonly accepted use of the term 'lightning,' and in no case to include loss or damage by cyclone, tornado or wind-storm) whether fire ensues or not; it being made a condition of this contract that any loss or damage to dynamos, exciters, lamps, switches, motors or other electrical appliances or devices, such as may be caused by lightning or other electrical currents, artificial or natural, is expressly excluded, unless fire ensues, and then this Company is liable only for such loss or damage to them as may be caused by such ensuing fire. It is also a condition of this contract that if there is other insurance upon the property damaged this Company shall be liable only for such proportion of any direct loss or damage by lightning (except as above stated) [fol. 74] as the amount hereby insured bears to the whole amount insured thereon whether such other insurance contains a similar clause or not.

Attached to and made a part of Policy No. 25322 issued at the Philadelphia Agency of the Springfield Fire & Marine Insurance Company, of Springfield, Mass.

Dated 8/4/31.

Dennis J. Sweeny & Co., Insurance, 411 Walnut St. Philadelphia, Pa.

Dennis J. Sweeny & Co., Agents, by R. D. Sweeny, Secy.

4–1928–1M. Printed in U. S. A.

It is understood that the buildings insured hereunder are now under foreclosure proceedings by the Corn Exchange National Bank & Trust Co. The premium being paid by the Corn Exchange National Bank & Trust Co., it is agreed that in event of loss, same will be adjusted with the Corn Exchange National Bank & Trust Co. and paid to them and John M. Kennedy, 3rd, Mortgagee, as interest may appear.

Standard Mortgage Clause

Springfield Fire & Marine Insurance Company,

Springfield, Massachusetts

Loss or damage, if any, under this Policy, shall be payable to John M. Kennedy, 3rd as mortgagee (or trustee) as interest may appear, and this insurance, as to the interest [fol. 75] of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this Policy; provided, that in case the mortgagor or owner shall neglect to pay any premium due under this Policy, the mortgagee (or trustee) shall, on demand, pay the same.

Provided, also, that the mortgagee (or trustee) shall notify this Company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee) and, unless permitted by this Policy, it shall be noted thereon and the mortgagee (or trustee) shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this Policy shall be null and void.

This Company reserves the right to cancel this Policy at any time as provided by its terms, but in such case this Policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice to the mortgagee (or trustee) of such cancellation and shall then cease, and this Company shall have the right, on like notice, to cancel this agreement.

Whenever this Company shall pay the mortgagee (or trustee) any sum for loss or damage under this Policy and

shall claim that, as to the mortgagor or owner, no liability therefor existed, this Company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under [fol. 76] all securities held as collateral to the mortgage debt, or may at its option, pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgagee with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all other such securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of his claim.

Attached to and made a part of Policy No. 25322 issued at the Philadelphia Agency of the Springfield Fire & Marine Insurance Company, of Springfield, Mass.

Dated 8/4/31.

Dennis J. Sweeny & Co., Insurance, 411 Walnut St. Philadelphia, Pa.

Dennis J. Sweeny & Co., Agents, by R. D. Sweeny, Secy.

11–1927. 1M. Printed in U. S. A.

This policy is made and accepted subject to the foregoing stipulations and conditions, and to the stipulations and conditions printed on the back hereof, which are hereby made a part of this policy, together with such other provisions, stipulations and conditions as may be endorsed hereon or added hereto as herein provided.

In Witness Whereof, this Company has executed and attested these presents; but this policy shall not be valid until countersigned by the duly authorized Agent of the Company at Philadelphia, Pa.

Geo. G. Bulkley, President. Wm. A. Herbert, Secretary.

Countersigned this 4th day of August, 1931.

Dennis J. Sweeny & Co., Agents, by R. D. Sweeny, Secy.

Fraud, misrepresentation, etc. This entire policy shall be void if the insured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

Property uninsurable and excepted. This policy shall not cover accounts, bills, currency, deeds, evidences of debt, money notes, or securities; nor, unless specifically named hereon in writing; bullion, manuscripts, mechanical drawings, dies, or patterns.

Hazards not covered This Company shall not be liable for loss or damage caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire, or when the property is endangered by fire in neighboring premises.

This entire policy shall be void, unless otherwise provided by agreement in writing added hereto,—

Ownership, etc. (a) if the interest of the insured be other than unconditional and sole ownership; or (b) if the subject of insurance be a building on ground not owned by the insured in fee simple; or (c) if, with the knowledge of the insured, foreclosure proceedings be commenced, or notice given of sale of any property insured hereunder, by reason of any mortgage or trust deed; or (d) if any change other than by the death of an insured take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard); or (e) if this policy be assigned before a loss.

Unless otherwise provided by agreement in writing added hereto, this Company shall not be liable for loss or damage occurring,—

Other insurance (a) while the insured shall have any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or

Increase of hazard. (b) while the hazard is increased by any means within the control of the insured; or

Repairs, etc. (c) while mechanics are employed in building, altering, or repairing the described premises

beyond a period of fifteen days; or

Explosives, gas, etc. (d) while illuminating gas or vapor is generated on the described premises; or while (any usage or custom to the contrary notwithstanding) there is kept, used, or allowed on the described premises fireworks, greek fire, phosphorus, explosives, benzine, gasoline, naphtha, or any other petroleum product of greater inflammability than kerosene oil, gunpowder exceeding twenty-five pounds, or kerosene oil exceeding five barrels; or

Factories. (e) if the subject of insurance be a manufacturing establishment, while operated in whole or in part between the hours of ten P. M. and five A. M., or while it ceases to be operated beyond a period of ten days; or

Unoccupancy. (f) while a described building whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of ten days; or

Explosion, lightning. (g) by explosion or lightning, unless fire ensue, and in that event for loss or damage by fire only.

Chattel mortgage. Unless otherwise provided by agreement in writing added hereto, this Company shall not be liable for loss or damage to any property insured hereunder while incumbered by a chattel mortgage, and during the time of such incumbrance this Company shall be liable only for loss or damage to any other property insured hereunder.

Fall of building. If a building or any material part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

Added clauses. The extent of the application of insurance under this policy, and of the contribution to be made by this Company in case of loss or damage, and any other agreement not inconsistent with or a waiver of any of the conditions or provisions of this policy, may be provided for by agreement in writing added thereto.

Waiver. No one shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement added thereto; nor shall any such provision or condition be held to be waived unless such waiver shall be in writing added hereto; nor shall any provision or condition of this policy, or any forfeiture, be held to be waived by any requirement, act, or proceed-

ing, on the part of this Company relating to appraisal or to any examination herein provided for; nor shall any privilege or permission affecting the insurance hereunder exist or be claimed by the insured unless granted herein or by rider added hereto.

Cancellation of policy. This policy shall be cancelled at any time at the request of the insured; in which case the Company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time. This policy may be cancelled at any time by the Company, by giving to the insured a five days' written notice of cancellation, with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand.

Pro rata liability. This Company shall not be liable for a greater proportion of any loss or damage than the amount hereby insured shall bear to the whole insurance covering the property, whether valid or not, and whether collectible or not.

Noon. The word "noon" herein means noon of standard time at the place of loss or damage.

Mortgage interests. If loss or damage is made payable, in whole or in part, to a mortgagee not named herein as the insured this policy may be cancelled as to such interest by giving to such mortgagee a ten days' written notice of cancellation. Upon failure of the insured to render proof of loss, such mortgagee shall, as if named as insured hereunder, but within sixty days after such failure, render proof of loss, and shall be subject to the provisions hereof as to appraisal and time of payment and of bringing suit. On payment to such mortgagee of any sum for loss or damage hereunder, if this Company shall claim that as to the mortgagor or owner no liability existed, it shall, to the extent of such payment, be subrogated to the mortgagee's right to recovery and claim upon the collateral to the mortgage debt, but without impairing the mortgagee's right to sue, or it may pay the mortgage debt and require an assignment thereof and of the mortgage; other provisions relating to the interests and obligations of such mortgagee may be added hereto by agreement in writing.

80 Plaintiff's Exhibit 2 (Policy No. 25322).

Requirements in case of loss. The insured shall give immediate notice in writing to this Company of any loss or damage, protect the property from further damages, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, stating the quantity and cost of each article and the amount claimed thereon; and **the insured shall, within sixty days' after the fire, unless such time is extended in writing by this Company, render to this Company a proof of loss,** signed and sworn to by the insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss or damage thereto; all incumbrances thereon; all other contracts of insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; and by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged. The insured as often as may be reasonably required shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations, under oath, by any person named by this Company, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof, if originals be lost, at such reasonable time and place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made.

Appraisal. In case the insured and this Company shall fail to agree as to the amount of loss or damage, each shall, on the written demand of either, select a competent and disinterested appraiser. The appraisers shall first select a competent and disinterested umpire, and, failing for fifteen days to agree upon such umpire, then, on request of the insured or this Company, such umpire shall be elected by a judge of a court of record in the county in which the property insured is located. The appraisers shall then appraise the loss and

damage, stating separately sound value and loss or damage to each item, and, failing to agree, shall submit their differences only to the umpire. An award in writing, so itemized, of any two, when filed with this Company, shall determine the amount of sound value and loss or damage. Each appraiser shall be paid by the party selecting him, and the expenses of appraisal and umpire shall be paid by the parties equally.

Company's options. It shall be optional with this Company to take all or any part of the articles at the agreed or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality, within a reasonable time, giving notice of its intention so to do prior to thirty days after ascertainment of loss or damage is made, as herein provided.

Abandonment. There can be no abandonment to this Company of any property.

When loss payable. The amount of loss or damage for which this Company may be liable shall be payable sixty days after proof of loss as herein provided is received by this Company, and ascertainment of the loss or damage is made, either by agreement between the insured and this Company expressed in writing or by the filing with this Company of an award as herein provided.

Suit. No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless the claimant shall show compliance wtih all the requirements of this policy, nor unless commenced within twelve months next after the fire.

Subrogation. This Company may require from the insured an assignment of all right of recovery against any party far loss or damage to the extent that payment therefor is made by this Company.

82 Plaintiff's Exhibit 2 (Policy No. 25322):

ASSIGNMENT OF INTEREST BY INSURED

The interest of as owner of property covered by this Policy is hereby assigned to subject to the consent of the SPRINGFIELD FIRE & MARINE INSURANCE CO. OF SPRINGFIELD, MASS.

.....
(Signature of Insured)

Dated .....

CONSENT BY COMPANY TO ASSIGNMENT OF INTEREST

THE SPRINGFIELD FIRE & MARINE INSURANCE CO. OF SPRINGFIELD, MASS. hereby consents that the interest of
as owner of the property covered by this Policy be assigned to

.....
(Signature for the Company)

Dated.....

FORM FOR REMOVAL

Permission is hereby granted to remove the property insured by this Policy to the
situate
and this Policy is hereby made to cover same property in new locality, all liability in former locality to cease from this date.

Rate increased to....% Additional Premium $.....
Rate reduced.....% Return Premium $.....
Dated ..... 19.... ..... Agent.
Sheet.....Block.....No.....

[fol. 83] Receipt for Return Premium

To be Signed by the Assured

—— ——, Agency. —— —, 19—.

In consideration of — Dollars return premium, receipt of which is hereby acknowledged, this policy is hereby canceled and surrendered to the Company.

—— ——, Assured.

No. of Policy —.
No. of Renewal —.
Amount Insured, $—.

Date of	Year	Month	Day
Cancellation			
Date of Policy			
Time in Force			
Premium Paid		$	
" Earned		$	
" Returned		$	

If pro rata, state reason why.

Springfield Fire & Marine Insurance Company

Springfield, Massachusetts,

Office, No. 195 State St.

G. G. Bulkley, President; W. B. Cruttenden, Vice-President; F. H. Williams, Vice-President; W. A. Hebert, Secretary; F. A. Schlesinger, Treasurer.

(Rubberstamp: Rec'd Mar. 2, 1932. 2—. S. F. & M. Ins. Co. Mail Dept.")

Mr. Shapiro: Your Honor, we will be obliged to offer a [fol. 84] copy of the third insurance policy because Mr. Schell tells me that it is not available; they have not been able to get hold of it.

Mr. Schell: That copy, if your Honor pleases, is attached to the Affidavit of Defense.

Mr. Shapiro: We offer in evidence the copy set forth in the affidavit of defense.

Your Honor, I offer all these policies in evidence without the lead pencil notations and the stamps which were placed on the policies subsequent to the issuance thereof.

(Policy in question marked Plaintiff's Exhibit 3. The said exhibit reads as follows:

PL'T'FF'S EXHIBIT 3

"The Liverpool and London and Globe Insurance Company, Limited, of Liverpool, England

No. L-331072

Amount $5000. Rate 2.61. Premium $130.50.

In Consideration of the Stipulations herein named and of One Hundred Thirty & 50/100 Dollars Premium, Does Insure Glenwood Industrial Distilling Co. and legal representatives, to the extent of the actual cash value (ascertained with proper deductions for depreciation) of the property at the time of loss or damage, but not exceeding the amount which it would cost to repair or replace the same with material of like kind and quality within a reasonable time after such loss or damage, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair and without compensation for loss resulting from interruption of business or manufacture, for the term of One Year from the 17th [fol. 85] day of July, 1931, at noon, to the 17th day of July 1932, at noon, against all Direct Loss and Damage by Fire and by removal from premises endangered by fire, except as herein provided to an amount not exceeding Five Thousand Dollars, to the following described property while located and contained as described herein, or pro rata for five days at each proper place to which any of the property shall necessarily be removed for preservation from fire, but not elsewhere, to wit:

This policy is made and accepted subject to the foregoing stipulations and conditions, and to the stipulations and conditions printed on the back hereof, which are hereby made a part of this policy, together with such other provisions, stipulations and conditions as may be endorsed hereon or added hereto as herein provided.

Provisions Required by Law to be Stated in this Policy.—This policy is in a stock corporation.

In Witness Whereof, this Company has executed and attested these presents; but this policy shall not be valid unless countersigned by the duly authorized Agent of the Company at Philadelphia, Penna.

Harold Warner, United States Fire Manager.

Mortgagee Clause

Loss or damage, if any, under this policy, shall be payable to John M. Kennedy, 3rd as Mortgagee — mortgagee, (or trustee) as interest may appear and this insurance, as to the interest of the mortgagee (or trustee) only therein, [fol. 86] shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by the policy; Provided, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same.

Provided also, that the mortgagee (or trustee) shall notify this Company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee or (trustee) and, unless permitted by this policy, it shall be noted therein and the mortgagee (or trustee) shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void.

This Company reserves the right to cancel this policy at any time as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice to the mortgagee (or trustee) of such cancellation and shall then cease, and this Company shall have the right, on like notice, to cancel this agreement.

Whenever this Company shall pay the mortgagee (or trustee) any sum for loss or damage under this policy and shall claim that, as to the mortgagor or owner, no liability therefor existed, this Company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may, at its option, pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage with [fol. 87] interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the

mortgagee (or trustee) to recover the full amount of his claim.

Attached to and forming part of Policy No. L-331072 of the Liverpool and London and Globe Insurance —— Insurance Company.

Countersigned at Philadelphia this — day of ——, 19—.

—— ——, Agent.

Form X3049-20M-11-31

On Brick Building, with additions and extensions thereto, to include fire escapes, fire extinguishing apparatus, elevators and attachments, dumb waiters and appurtenances, heating and lighting apparatus, dynamos and motors and appurtenances thereof, wiring, permanent partitions, piping, plumbing, wall paper, permanent decorations, gas and electric fixtures and all permanent fixtures, but excluding excavations and foundations below the ground or street level, occupied for distilling ethyl alcohol and/or other purposes not more hazardous situate on North side of Cedar Street about 200′ North of Tioga Street, Philadelphia, Pa. Loss, if any, payable to John M. Kennedy, 3rd, mortgagee

In addition to the privilege contained in the printed conditions of this policy, permission is hereby given to make ordinary alterations and repairs in the within-described premises, but this shall not be held to include the reconstruction or the enlargement of the same, and this policy (so far as it applies on buildings) shall also cover in accordance with the conditions of this policy, all materials and supplies therefor, therein or adjacent, and such alterations.

[fol. 88] Other insurance permitted without notice until required.

Privilege for existing communications.

It is understood that the buildings insured hereunder are now under foreclosure proceedings by the Corn Exchange National Bank & Trust Co. The premium being paid by the Corn Exchange National Bank & Trust Co., it is agreed that in event of loss, same will be adjusted with the Corn Exchange National Bank & Trust Co., and paid to them and John M. Kennedy, 3rd, Mortgagee, as interest may appear.

Electric Current Permit

Permission is granted under this policy for the use of Electric Current after certificate of approval has been issued by the Philadelphia Fire Underwriters' Association and while it remains unrevoked by said Association.

Reduced Rate Average Clause

In consideration of the reduced rate and (or) form under which this policy is written, it is expressly stipulated and made a condition of this contract that in the event of loss this Company shall be liable for no greater proportion thereof than the amount hereby insured bears to 80 per cent. of the actual cash value of the property described herein at the time when such loss shall happen, nor for more than the proportion which this policy bears to the total insurance thereon.

In the event that the aggregate claim for any loss is both less than ten thousand dollars ($10,000), and less than five per cent. (5%) of the total amount of insurance upon property described herein at the time such loss occurs, no special inventory or appraisement of the undamaged property shall [fol. 89] be required. If this policy be divided into two or more items, the foregoing shall apply to each item separately.

Lightning Clause and Electrical Apparatus Clause

Excluding Damage to Dynamos and Other Electrical Apparatus

This policy also covers direct loss or damage to the property insured by lightning (meaning thereby the commonly accepted use of the term 'lightning' and in no case to include loss or damage by cyclone, tornado or wind-storm whether fire ensues or not; it being made a condition of this contract that any loss or damage to dynamos, exciters, lamps, switches, motors or other electrical appliances or devices, such as may be caused by lightning or other electrical currents, artificial or natural, is expressly excluded, unless fire ensues, and then this Company is liable only for such loss or damage to them as may be caused by such ensuing fire. It is also a condition of this contract that if there is other insurance upon the property damaged this Company shall be liable only for such proportion of any direct loss

or damage by lightning (except as above stated) as the amount hereby insured bears to the whole amount insured thereon whether such other insurance contains a similar clause or not.

Attached to Policy No. L331072 of the Liverpool and London and Globe Insurance Co., Ltd.

H. W. Stephenson, Local Manager.

(Printed conditions of policy, Lines 1 to 200 inclusive, similar to those in Plaintiff's Exhibit 1, copy thereof appearing at side folio 63 of this Record.)

[fol. 90] JOHN M. KENNEDY, 3rd having been duly sworn, was examined and testified as follows:

By Mr. Shapiro:

Q. Mr. Kennedy, you are the John M. Kennedy—Junior, is it——

A. 3rd.

Q. —the John M. Kennedy, 3rd, whose name appears in the policies. You are familiar with these three policies, are you?

A. No, sir.

Q. You had better look at them. Whose name appears in this policy of the Ætna Insurance Company as mortgagee?

A. I have never seen them before. I had better look at them. I am John M. Kennedy, 3rd.

Q. Now, I show you a paper, which I am going to ask the stenographer to mark for identification Plaintiff's Exhibit 4, and ask you whether or not you signed that paper.

A. Yes, sir; that's my signature.

Mr. Shapiro: I offer this paper in evidence, if your Honor pleases, as Plaintiff's Exhibit 4.

PL'T'FF'S EXHIBIT 4

(The said exhibit reads as follows:

"For Good and Valuable Consideration Received, the receipt of which is hereby acknowledged, I hereby transfer, assign and set over unto Anna L. Bogash, her heirs and

assigns, any and all right, title and interest that I may have in and to any claim or claims arising from the fire loss sustained on the Glenwood Industrial Distilling property situate on Cedar Street above Tioga Street.

Witness my hand and seal this 26th day of March A. D. 1932.

[fol. 91] Witnesseth: W. Fred Speer. John M. Kennedy, 3rd. (Seal).")

By Mr. Shapiro:

Q. I show you papers, which I have had marked for identification Nos. 5 and 6——

By the Court:

Q. As I understand it, you have no real personal knowledge of these policies? All that you know is that you are John M. Kennedy 3rd?

A. That's right, sir.

By Mr. Shapiro:

Q. Now, I show you papers, which have been marked for identification Nos. 5 and 6, and ask you to tell me whether you saw paper No. 5 before to-day?

A. Yes, sir.

Q. Do you know what that paper is?

A. Yes, sir.

Q. What is it?

A. It is a mortgage.

Q. For how much?

A. $25,000.

Q. That is the principal sum, is it not?

A. Yes, sir.

Q. And are you the John M. Kennedy, 3rd, mentioned in that mortgage?

A. Yes, sir.

Q. What is the date of that mortgage?

A. The 27th day of December, 1921.

Q. On the 21st or 24th of March, 1932, where you the owner of that mortgage?

A. I will have to consult the assignment to discover the exact date.

Q. I can give you the date of the assignment. You have before you the assignment, and you are the owner of the

[fol. 92] mortgage, which is paper No. 6, which I show you. Have you seen that before?

A. Yes, sir.

Q. What is that?

A. That is the bond which accompanied the mortgage.

Q. That is correct, and you were the owner of the bond as well on the 24th, before you signed this assignment (indicating)?

A. Yes, sir.

Mr. Shapiro: I offer these papers in evidence, if your Honor pleases—5 and 6.

Mr. Schell: For what purpose?

Mr. Shapiro: I merely offer them in evidence.

The Court: What is the relevancy of them?

Mr. Shapiro: I want to prove that this is the property that was insured by the policies, and that the property covered by this mortgage was destroyed by fire, unless my friends admit it.

Mr. Schell: I don't see how that is going to help to prove anything.

The Court: I don't quite catch the connection.

Mr. Shapiro: It happened that there was a fire and that there was a certain amount of loss. Now, I want to prove that the policies were intended to cover this particular mortgage, irrespective of what the policies were.

The Court: I do not see how you prove anything by offering a mortgage in evidence. All you have to prove is that that mortgage was given. Mr. Kennedy told you that he owned it up to a certain time, and that it was then assigned. [fol. 93] Mr. Shapiro: That is correct, but I can't prove the whole case at one time. If my friends will admit that the property covered by this mortgage was the property that was intended to be insured by these policies, then I am through.

The Court: We will assume that the jury can find from a comparison of the description whether it is the same property or not. You have something in your mind that I haven't in my mind. I do not see how the offering of the mortgage proves anything, other than that mortgage was given.

Mr. Shapiro: That is right. I expect to follow that up.

The Court: That is what I do not get in my mind. You propose to follow it up by what?

Mr. Shapiro: By proof that this mortgage was the mortgage that was intended to be insured by the policies that have been offered in evidence.

The Court: Does the policy refer to the mortgage?

Mr. Ambler: Yes.

Mr. Shapiro: Yes; it does.

The Court: Then, I will admit it, to be followed by proof that that is the policy of insurance.

(The said Plaintiff's Exhibits 5 and 6 read, respectively, as follows:

PLAINTIFF'S EXHIBIT 5

"282725. 320959.

Mortgage

Catherine A. Hutchinson

to

John M. Kennedy, Jr.

[fol. 94] For $25,000.

(No. 453—Yeo & Lukens Co., 12 N. 13th and 719 Walnut Sts., Phila.)

Jesse H. Finn,

Jan. 13, 1922. 307 Lincoln Bldg.

(No. 453—Sci. Fa. Mortgage—Com., Ins., Tax and Water Receipt. Printed and sold by Yeo & Lukens Co., 12 N. 13th St. and 719 Walnut St., Phila.)

This Indenture made the 27th day of December in the year of our Lord one thousand nine hundred and twenty-one (1921) Between Catherine A. Hutchinson, of the City of Philadelphia, Single-woman, (hereinafter called the Mortgagor) of the one part, and John M. Kennedy, Jr., of the same place, (hereinafter called the Mortgagee), of the other part:

Whereas, the said Mortgagor, in and by a certain Obligation or Writing obligatory under her hand and seal duly executed, bearing even date herewith, stands bound unto the said Mortgagee in the sum of Fifty thousand dollars lawful money of the United States of America, conditioned for the payment of the just sum of Twenty-five thousand dollars, lawful money as aforesaid, within five years from the date

thereof, together with interes thereon, payable half yearly at the rate of six per cent. per annum, without any fraud or further delay, and for the production to the Mortgagee his Executors, Administrators or Assigns, on or before the First day of November, of each and every year, of receipts for all taxes and water rents of the current year assessed upon the mortgaged premises, and also, from time to time, and at all times, until payment of said principal sum, for the keeping of the buildings mentioned in this Mortgage insured [fol. 95] against loss or damage by fire for the benefit of the Mortgagee in the sum of Twenty-five thousand dollars,

Provided, However, and it is thereby expressly agreed, that, if at any time default shall be made in the payment of interest as aforesaid for the space of thirty days after any half yearly payment thereof shall fall due, or in such production to the Mortgagee his Executors, Administrators or Assigns, on or before the First day of November of each and every year, of such receipts for taxes and water rents of the current year assessed upon the premises mortgaged, or in the maintenance of such insurance, then and in such case the whole principal debt aforesaid shall, at the option of the said Mortgagee his Executors, Administrators or Assigns, become due and payable immediately, and payment of said principal debt and all interest thereon, may be enforced and recovered at once, anything therein contained to the contrary notwithstanding. And Provided Further, however, and it is thereby expressly agreed, that if at any time thereafter, by reason of any default in payment, either of said principal sum at maturity, or of said interest, or in the production of said receipts for taxes and water rents within the time specified, or in the maintenance of such insurance, a writ of Fieri Facias is properly issued upon the judgment obtained upon said Obligation, or by virtue of said Warrant of Attorney, or a writ of Scire Facias is issued upon this indenture of Mortgage, an attorney's commission for collection, viz.: five per cent., shall be payable, and shall be recovered in addition to all principal and interest then due, besides costs of suit, and all expenses of effecting such insurance, as in and by the said recited Obligation and the Condition thereof, relation being thereunto had, may more fully and at large appear.

[fol. 96] Now this Indenture Witnesseth, That the said Mortgagor, as well for and in consideration of the aforesaid debt or principal sum of Twenty-five thousand dollars

and for the better securing the payment of the same, with interest, unto the said Mortgagee his Executors, Administrators and Assigns, in discharge of the said recited Obligation, as for and in consideration of the further sum of One Dollar unto her in hand well and truly paid by the said Mortgagee at and before the sealing and delivery hereof, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened, enfeoffed, released and confirmed, and by these presents doth grant, bargain, sell, alien, enfeoff, release and confirm unto the said Mortgagee his Heirs and Assigns,

All that Certain lot or piece of ground with the buildings and improvements thereon erected, Situate on the Southeast side of Cedar Street (fifty feet wide) at the distance of One hundred and ninety-five feet Northeastward from the Northeast side of Tioga Street (sixty feet wide) in the Forty-fifth Ward of the said City of Philadelphia. Containing in front or breadth on said Cedar Street Ninety-two feet and extending of that width in length or depth Southeastward between lines parallel with Venango Street One hundred and sixty-seven feet nine and three-eighths inches to the — middle — of a certain railroad track.

Being the same premises which the said John M. Kennedy, Jr., and wife by Indenture bearing even date herewith and intended to be forthwith recorded granted and conveyed unto the said Mortgagor, in fee,

Together with the free and common use, right, liberty and [fol. 97] privilege of said railroad track at all times hereafter forever in common with the owners, tenants and occupiers of other ground of the said John M. Kennedy, Jr., bounding thereon.

Together with all and singular the buildings, Ways, Waters, Water-Courses, Rights, Liberties, Privileges, Improvements, Hereditaments and Appurtenances whatsoever thereunto belonging, or in anywise appertaining, and the Reversions and Remainders, Rents, Issues and Profits thereof.

To Have and to Hold the said lot or piece of ground above described with the buildings and improvements thereon erected Hereditaments and Premises hereby granted, or mentioned and intended so to be, with the Appurtenances, unto the said Mortgagee his Heirs and Assigns, to and for the only proper use and behoof of the said Mortgagee his Heirs and Assigns forever.

And the said Mortgagor for herself her Heirs, Executors and Administrators, doth hereby covenant, promise and agree, to and with the said Mortgagee his Executors, Administrators and Assigns, that if the said Mortgagor her Heirs, Executors or Administrators, shall neglect or refuse to keep up the aforesaid insurance, it shall be lawful for the said Mortgagee, his Executors, Administrators or Assigns, to insure the said building in a sum sufficient to secure payment of the said principal debt in case of fire, and all costs and expenses of effecting such insurance shall be treated as part of the principal debt in a suit upon this Mortgage.

Provided Always, nevertheless, that if the said Mortgagor her Heirs, Executors, Administrators or Assigns, [fol. 98] shall and do well and truly pay, or cause to be paid, unto the said Mortgagee his Executors, Administrators or Assigns, the aforesaid debt or principal sum of Twenty-five thousand dollars on the day and time hereinbefore mentioned and appointed for payment of the same, together with interest as aforesaid, and shall produce to the said Mortgagee his Executors, Administrators or Assigns, on or before the First day of November of each and every year, receipts for all taxes and water rents of the current year assessed upon the premises mortgaged, without any fraud or further delay, and without any deduction, defalcation or abatement to be made of anything, herein mentioned to be paid or done, and shall keep the building mentioned in this Mortgage insured as aforesaid, then, and from thenceforth, as well this present Indenture, and the estate hereby granted, as the said recited Obligation shall cease, determine and become void, anything hereinbefore contained to the contrary thereof in anywise notwithstanding. And Provided, Also, that it shall and may be lawful for the said Mortgagee his Executors, Administrators or Assigns, when and as soon as the principal debt or sum hereby secured shall become due and payable as aforesaid, or in case default shall be made for the space of thirty days in the payment of interest on the said principal sum after any half yearly payment thereof shall fall due, or in case there shall be default in the production to the said Mortgagee, his Executors, Administrators or Assigns, on or before the First day of November of each and every year, of such receipts for taxes and water rents of the current year as-

sessed upon the premises mortgaged, or in the maintenanec of the insurance as aforesaid, to sue out forthwith a writ or writs of Scire Facias upon this Indenture of Mortgage, and to proceed thereon to judgment and execution for the re- [fol. 99] covery of the whole of said principal debt, and all interest due thereon, together with an attorney's commission for collection, viz.: five per cent., besides costs of suit, and all expenses of effecting such insurance, without further stay, any law, usage or custom to the contrary notwithstanding.

In Witness Whereof, the said Mortgagor to these presents hath hereunto set her hand and seal. Dated the day and year first above written.

Catherine A. Hutchinson. (Seal.)

Sealed and Delivered in the presence of us Frances K. Maher, E. H. Rutberg.

STATE OF PENNSYLVANIA,
County of Philadelphia:

On the 27th day of December Anno Domi- before me, a Notary Public in and for said State and County, personally appeared the above-named Catherine A. Hutchinson, and in due form of law acknowledged the above Indenture of Mortgage to be her act and deed and desired the same might be recorded as such.

Witness my hand and Notarial seal, the day and year aforesaid.

Frances K. Maher. Com. expires at end of Next Session of Senate. (Seal.)

The mtgee. resides at 406 S. Van Pelt.

[fol. 100] Recorded in the Office for Recording of Deeds in and for the County of Philadelphia, 352 in Mortgage Book J. M. H. No. 2288 page &c.

Witness my hand and seal of Office this Thirteenth day of January Anno Domini 1922

James M. Hazlett, Recorder of Deeds, by (Signature illegible), Deputy Recorder."

PLAINTIFF'S EXHIBIT 6

"282725. 19

Bond and Warrant

Catherine A. Hutchinson

to

John M. Kennedy, Jr.

To Prothy, C. P.:

This Bond and accompanying mortgage was duly assigned by John M. Kennedy Jr. by assignment dated November 21, 1922, Recorded November 21, 1922 in Assignment of Mortgagee Book No. 844 pages 571 &c., to John M. Kennedy, 3rd.

Jos. B. Quigley, Atty. for Assgn—.

To Prothy C. P.:

Enter my appearances for John M. Kennedy, 3rd.

Jos. B. Quigley, Atty. for John M. Kennedy, 3rd; Assignee, Plff.

Jesse H. Finn, 307 Lincoln Bldg.

(No. 452—Sci. Fa. Bond and Warrant—Com., Ins. Tax and Water Receipts. Printed and sold by Yeo & Lukens Co., 23 N. 13th St. and 719 Walnut St., Phila.)

[fol. 101] Know All Men by These Presents that I, Catherine A. Hutchinson, of the City of Philadelphia, Singlewoman, (hereinafter called the Obligor) and held and firmly bound unto John M. Kennedy, Jr., of the same place, (hereinafter called the Obligee) in the sum of Fifty thousand dollars lawful money of the United States of America to paid to the said Obligee his certain Attorney, Executors, Administrators or Assigns; to which payment well and truly to be made, I do bind and oblige myself my Heirs, Executors and Administrators firmly by these Presents. Sealed with my Seal. Dated the 27th day of December, in the year of our Lord one thousand nine hundred and twenty-one.

The Condition of this Obligation is Such, That if the bounden Obligor her Heirs, Executors or Administrators, or any of them, shall and do well and truly pay, or cause to be paid unto the above named Obligee his certain Attorney, Executors, Administrators or Assigns, the just sum of Twenty-five thousand dollars lawful money as aforesaid,

within five years from the date hereof, together with interest thereon payable half yearly at the rate of six per cent. per annum, without any fraud or further delay; and shall produce to the said Obligee or his Executors, Administrators or Assigns, on or before the First day of November of each and every year, receipts for all taxes and water rents of the current year assessed upon the premises described in the accompanying mortgage; and also from time to time and at all times until payment of said principal sum, keep the buildings mentioned in the said mortgage insured against loss or damage by fire for the benefit of the Mortgagee in the sum of Twenty five thousand dollars then the above Obligation to be void, or else to be and remain in full force and virtue: Provided, however, and it is [fol. 102] hereby expressly agreed, that, if at any time default shall be made in payment of interest as aforesaid, for the space of thirty days after any half yearly payment thereof shall fall due or in such production to the Obligee or his Executors, Administrators or Assigns, on or before the First day of November of each and every year, of such receipts for the taxes and water rents of the current year assessed upon the premises mortgaged, or in the maintenance of such insurance, then and in such case the whole principal debt aforesaid, shall, at the option of the said Obligee his Executors, Administrators or Assigns, become due and payable immediately, and payment of said principal debt and all interest thereon, may be enforced and recovered at once, anything herein contained to the contrary notwithstanding.

And Provided Further, however, and it is hereby expressly agreed, that if at any time hereafter, by reason of any default in payment, either of said principal sum at maturity, or of said interest, or in production of said receipts for taxes and water rents within the time specified, or in the maintenance of such insurance, a writ of Fieri Facias is properly issued upon the Judgment obtained upon this Obligation, or by virtue of the Warrant of Attorney hereto attached, or a writ of Scire Facias is properly issued upon the accompanying Indenture of Mortgage, an attorney's commission for collection, viz.: five per cent., shall be payable, and shall be recovered in addition to all principal and interest then due, besides costs of suit and all expenses of effecting such insurance.

Sealed and Delivered in the presence of us Frances K. [fol. 103] Maher, G. H. Rutberg, Catherine A. Hutchinson. (Seal.)

(Cancelled U. S. Documentary stamps to value of $12.50 affixed.)

To —— —— Attorney of the Court of Common Pleas, at Philadelphia, in the County of Philadelphia in the State of Pennsylvania or to any other Attorney of the said Court, or any other Court there or elsewhere.

Whereas, I, Catherine A. Hutchinson, of the City of Philadelphia, Single-woman, in and by a certain Obligation, bearing even date herewith, do stand bound unto John M. Kennedy, Jr., of the same place, in the sum of Fifty thousand dollars lawful money of the United States of America, conditioned for the payment of the just sum of Twenty-five thousand dollars lawful money as aforesaid, together with interest thereon payable half yearly at the rate of six per cent. per annum, and for the production to the Obligee his Executors, Administrators or Assigns, on or before the First day of November of each and every year, of receipts for all taxes and water rents of the current year assessed upon the premises described in the Mortgage accompanying said Obligation; and also from time to time and at all times until payment of said principal sum, to keep the buildings mentioned in the said Mortgage insured against loss or damage by fire for the benefit of the Mortgagee in the sum of Twenty-five thousand dollars.

Provided, however, and it is thereby expressly agreed, that if at any time default shall be made in payment of interest as aforesaid, for the space of thirty days after any half yearly payment thereof shall fall due, or in such pro- [fol. 104] duction to the Obligee his Executors, Administrators or Assigns, on or before the First day of November of each and every year, of such receipts for the taxes and water rents of the current year assessed upon the premises mortgaged, or in the maintenance of such insurance, then and in such case the whole principal debt aforesaid shall, at the option of said Obligee his Executors, Administrators or Assigns, become due and payable immediately, and payment of said principal debt and all interest thereon, may be enforced and recovered at once, anything therein contained to the contrary notwithstanding.

And Provided Further, however, and it is thereby ex-

pressly agreed, that if at any time thereafter, by reason of any default in payment, either of said principal sum at maturity, or of said interest, or in production of said receipts for taxes and water rents within the time specified, or in the maintenance of such insurance, a writ of Fieri Facias is properly issued upon the Judgment obtained upon said Obligation, or by virtue of this Warrant, or a writ of Scire Facias is properly issued upon the accompanying Indenture of Mortgage, an attorney's commission for collection, viz.: five per cent. shall be payable, and shall be recovered in addition to all principal and interest then due, besides costs of suit and all expenses of effecting such insurance. These are to desire and authorize you, or any of you, to appear for me my Heirs, Executors or Administrators, in the said Court or elsewhere, in any appropriate action there or elsewhere brought or to be brought against me my Heirs, Executors or Administrators, at the suit of the said Obligee his Executors, Administrators or Assigns, on the said Obligation, as of any term or time past, present, or any other subsequent term or time there or elsewhere to be held, and confess Judgment thereupon against me my [fol. 105] Heirs, Executors or Administrators, for the sum of Fifty thousand dollars lawful money of the United States of America, debt, besides costs of suit and all expenses of insurance as aforesaid, and an attorney's commission of five per cent. in case payment has to be enforced by process of law as aforesaid, by Non sum informatus, Nihil dicit, or otherwise, as to you shall seem meet: And for your or any of your so doing, this shall be your sufficient warrant. And I do hereby, for myself my Heirs, Executors or Administrators, remise, release, and forever quit claim unto the said Obligee his certain Attorney, Executors, Administrators and Assigns, all and all manner of error or errors, misprisions, misentries, defects and imperfections whatever, in the entering of the said judgment, or any process or proceedings thereon or thereto, or anywise touching or concerning the same.

In Witness Whereof, I have hereunto set my hand and seal this 27th day of December in the year of our Lord one thousand nine hundred and twenty-one.

Catherine A. Hutchinson. (Seal.)

Sealed and Delivered in the presence of us, Frances K. Maher, G. H. Rutberg.")

By Mr. Shapiro:

Q. Now, Mr. Kennedy, did you own any other mortgage on Tioga and Cedar Streets in the City of Philadelphia at this time or any time?

A. No, sir.

Q. Other than this one?

A. No, sir.

Q. Did you own any mortgage that was secured by a lien [fol. 106] on a property that was located either on Tioga Street or Cedar Street, other than this (indicating)?

A. Individually; no.

Q. What I mean is, you, yourself, didn't own any other mortgage, and this was the only mortgage that you owned on Cedar Street and Tioga (indicating)?

A. That's right, sir.

Q. Do you know the neighborhood at Tioga and Cedar Streets?

A. Pretty well, sir.

Q. On which street was the building that this mortgage was a lien on? On what street was it located?

A. On Cedar Street.

Q. Was there any other building but this one on Cedar Street between Tioga and the street next to it?

A. I am afraid I am not familiar enough with the neighborhood to state.

Cross-examination.

By Mr. Ambler:

Q. You are John M. Kennedy, 3rd, and you are the person that is named as the legal plaintiff in this suit, are you not?

A. I am John M. Kennedy, 3rd; the only one I know of. I am assuming I am the person.

Q. What I am getting at, you have no interest in this suit?

Mr. Shapiro: That is objected to as immaterial. It speaks for itself. That is immaterial.

Mr. Amber: Oh, no; he is the legal plaintiff.

The Court: I can't exclude evidence as to the interest of any witness that bears upon his credibility. I do not mean [fol. 107] by that his truthfulness, but what he knows about the facts to which he has testified. If he has a personal interest, he has one reason for acquainting himself with all

the details. If he has no personal interest, his attention to it might be more or less casual.

Mr. Shapiro: On the question of credibility, I have no objection.

The Witness: Yes; I am John M. Kennedy, I believe.

By Mr. Ambler:

Q. And you have no interest in these suits?

A. None whatever.

Q. And you do not have any claims against these defendant companies?

Mr. Shapiro: That is objected to.

A. None whatever.

Mr. Ambler: I want to ask him now whether he ever had any claim against these defendant companies.

Mr. Shapiro: I object to that, if the Court pleases.

Mr. Ambler: If the Court pleases, these suits are based on——

The Court: Now, these suits—all right. I will permit you to show that he has no interest whatever in these suits, but what his other relations with the company were, I do not see that we have anything to do with them.

Mr. Ambler: May I state my position?

Mr. Shapiro: I ask you to state it at side bar.

[fol. 108] (Discussion at side bar, off the record, and question withdrawn.)

By Mr. Ambler:

Q. Mr. Kennedy, you stated that you signed this assignment, marked Plaintiff's Exhibit 4?

A. That's right, sir; I did.

Q. Is it dated?

A. Yes, sir; the 26th day of March, 1932.

Q. Now, when you signed that assignment on the 26th day of March, 1932, is it not a fact that prior thereto you had notice of the cancellation of these policies, upon which this suit is founded?

Mr. Shapiro: Objected to.

(Objection overruled. Exception noted for plaintiff by direction of the Court.)

Mr. Shapiro: May I ask your Honor to instruct counsel to state whether he is speaking of the written notice or verbal notice?

Mr. Ambler: On cross-examination may I not ask him, first, whether he had notice of the cancellation, and then he can explain. I am entitled to a direct answer.

The Court: If you mean a cancellation in writing, why not ask that question, if you had a cancellation in writing, and I will give you a ruling on the question as you frame it. If you mean a written cancellation, put that in your question.

By Mr. Ambler:

Q. Didn't you have notice of the fact before this fire that these policies had been surrendered for cancellation?

Mr. Shapiro: Just a minute. I object to that.

[fol. 109] The Court: The question is whether or not he knew that these policies, that have been shown to him, had been surrendered to the respective companies for cancellation.

Mr. Shapiro: May I say to the Court that it doesn't make any difference if they were surrendered three times, if they were not surrendered by a proper method. The contract in this case is a contract that speaks for itself on the question of cancellation. There is only one way in which this contract can be cancelled with respect to the mortgagee, and that is specified in the policy how it must be cancelled. Therefore, I ask your Honor to say that that question is immaterial. The question can only be: was it cancelled?

The Court: No; this is cross-examination, and cross-examining counsel is never required to disclose the theory of the cross-examination. The question, as I understand, it was whether before and at the time he made this assignment he has referred to—whether or not at that time he knew that the policies that have been shown him, those policies had been surrendered to the insurance companies for the purpose of cancellation.

(Objection overruled. Exception noted for plaintiff by direction of the Court.)

The Witness: At the time of the assignment, to the best of my recollection and knowledge, I had never been shown

the policies involved. The notice of cancellation—any notice of cancellation that I had of insurance came to me several months before the fire by a telephone call from Mr. Winnet.

Mr. Shapiro: Now I ask that the answer be stricken out as not responsive to the question.

[fol. 110] The Court: Oh, I think that is responsive. He has told you, as I understand him, of his knowledge. He was asked whether he knew. He has given us a very clear statement of his knowledge on the subject.

Mr. Shapiro: It will only put me in the position of cross-examining my witness.

The Court: I have permitted him to answer the question.

Mr. Shapiro: Your Honor, I move that the answer be stricken out, especially for the reason that the notice referred to does not disclose whether or not it was a written notice or a verbal notice.

The Court: Oh, yes; he said by telephone.

Mr. Shapiro: I did not hear it.

(Motion denied. Exception noted for plaintiff by direction of the Court.)

By Mr. Ambler:

Q. Mr. Kennedy, you said that you had never seen the policies before today. Now, at the time of this assignment, did you in any way, shape, manner or form inform the purchaser that you had any interest in these policies?

Mr. Shapiro: That is objected to.

(Objection sustained. Exception noted for defendants by direction of the Court.)

(At side bar.)

Mr. Ambler: I would like to ask this question: is it not a fact that at the time of this transfer you sold this $25,000 mortgage and included any insurance policies in the transfer for $1,000, and that at the time you knew you had no interest in these policies?

[fol. 111] Mr. Shapiro: Objected to.

(Objection sustained. Exception noted for defendants by direction of the Court.)

By Mr. Ambler:

Q. At the time Mr. Winnet told you that the policies were cancelled—being surrendered for cancellation, you made no objection to that, did you?

A. As I recall the telephone conversation, Mr. Winnet said that he was cancelling, unless I chose to buy or take over the policies, to pay the unexpired premium. As I understood him, he was cancelling. I told him that I didn't intend to pay any unexpired premium or anything else, that I intended to put no further money into that building.

By the Court:

Q. Was that telephone conversation before or after you had assigned that mortgage?

A. Oh, long before, sir.

By Mr. Ambler:

Q. At least a month or six weeks before, wasn't it?

A. I don't know how that can be verified, but my guess would be nearer three months.

Q. Did you get a letter from Mr. Winnet,—a copy of which I show you—on February 6, 1932?

A. I am sorry, sir, but I can't answer the question. I don't know.

(Letter in question marked for identification Defendants' Exhibit 1.)

Redirect examination.

By Mr. Shapiro:

Q. When you spoke of the conversation with Mr. Winnet, you spoke of the one before the fire?

[fol. 112] A. Oh, yes.

Q. Now, didn't Mr. Winnet tell you, even after the fire, that he thought there was some insurance, but that he didn't know just what insurance there was, and that he would try immediately to find out?

A. My recollection of the two conversations with Mr. Winnet, which took place after the fire, were when I discovered in the morning paper that there had been a fire, and verified that by a telephone call with my office, and then I tried to reach Mr. Winnet and was successful. I called Mr. Winnet

and said, "I hope there was insurance." Mr. Winnet said he didn't know, but that he would try to find out, and later, the same morning, I received a 'phone call from Mr. Winnet in which he said that inasmuch as it was a legal holiday, he hadn't been able to reach the man that he had hoped, and that he didn't know whether there was any existing insurance or not.

Q. By the way, that mortgage transaction and the fire insurance in connection with it were not handled by you directly, were they?

A. Will you repeat that?

Q. I mean, the placing of the fire insurance and the mortgage, was that handled by you or your attorney?

A. I am afraid you will have to disassociate the two thoughts.

Q. All right. The insurance policies on this last transaction, were they handled by you or by your attorney?

A. The only handling of the fire insurance that was done by me or by my attorney, was a letter which I wrote, and you have marked here, to Mr. Winnet, as I recall, suggesting that insurance be taken out to protect not only my interests but his own.

Q. You do not mean his own. You mean the people he represented?

[fol. 113] A. The Corn Exchange Bank.

Q. Did you pay any part of the premium on this policy?

Mr. Ambler: Objected to. The policy speaks for itself.

A. No, sir.

By Mr. Shapiro:

Q. Did you send a check for this policy of insurance?

Mr. Ambler: That is objected to.

(Question withdrawn.)

Samuel S. Baxter, having been duly sworn, was examined and testified as follows:

By Mr. Shapiro:

Q. Where are you employed?

A. In the Bureau of Engineering, Surveys and Zoning, City of Philadelphia.

Q. And in that Bureau is there a record kept of the owners and titles of property and the locations of buildings on the particular pieces of property?

A. There's a record kept of all things, except the locations of buildings.

Q. Have you a record of the ownership of the property in the neighborhood of Tioga and Cedar Streets?

A. Yes.

Q. Do you have that with you?

A. I have it with me.

Q. Have you the plot plan?

A. Yes.

Q. And the registry book?

A. Yes.

[fol. 114] Q. Will you produce it, please?

(Witness complies.)

Q. Now, take Cedar Street north of Tioga Street, 195 feet north. Who was the owner of that property?

Mr. Schell: Now, wait a minute.

By Mr. Shapiro:

Q. Who was the owner in 1932?

Mr. Schell: What do you mean, the registered owner?

Mr. Shapiro: The registered owner?

The Witness: The registered owner is the Glenwood Industrial Distilling Company, Inc.

By Mr. Shapiro:

Q. Where did you get that reference of the registered owner?

A. The registered owners are placed in this book (indicating) from records of the deeds recorded in the Recorder of Deeds' office, and from probated wills and other sources.

Q. In other words, after the conveyance is recorded in the Recorder of Deeds office, you take that and register it in that book, is that correct?

A. Yes.

Q. Now, what is the description of that property in that book?

A. The registry plate shows a lot 195 feet northeast of Tioga Street, with a frontage of 92 feet and a width south-

eastwardly of 167 feet, 9⅜ inches. That is not the description from the deed, but just as shown on the plot plan.

Q. You have it on your plot plan?

A. That's the way we plotted the deed description on the plan.

[fol. 115] Q. How does Cedar Street run?

A. Cedar Street runs in a northeastwardly and southwestwardly direction.

Q. On which side of Cedar Street is that building, that you were talking about a minute ago?

A. The lot, which I was talking of, is on the south side of Cedar Street.

Q. At a distance, I think you said, of 195 feet northeastward from the north side of Tioga; is that right?

A. Yes, sir.

Q. Can you tell from that plot plan whether there are any buildings on the northeastwardly side of Cedar Street?

A. No; these plans don't show any buildings.

Q. They show that there are no buildings?

A. No; the plans in no case show any buildings.

Q. You mean you can't tell from that record——

A. Whether there are buildings or not.

Q. Are you familiar with that neighborhood?

A. I have worked through there.

Q. I mean, familiar enough to tell us anything about the buildings that were on there in February, 1932?

A. Yes; somewhat. I can remember certain buildings. I can't say that I can remember everything that was there.

Q. Do you know this building that was on the plot of ground that you have just described?

Mr. Ambler: Objected to.

By Mr. Shapiro:

Q. On the plot of ground 195 feet northeastward of Tioga Street?

The Court: If he knows any building on that plot, first.

[fol. 116] By Mr. Shapiro:

Q. Do you know whether there were any buildings on that corner of Cedar and Tioga?

A. That isn't the corner. There's 195 feet between the corner and that.

Q. I mean, do you know the corner right at Cedar and Tioga?

A. Yes; I know that corner.

Q. Was there any building on the corner there?

A. Not to my recollection; no.

Q. And for how many years does your recollection go as to that particular corner?

A. From 1924 to 1932.

Q. How about the opposite corner of Cedar and Tioga? Was there any building on that corner?

A. Not to my recollection; no.

Q. On the southeast side of Cedar Street, where was the first building? Where did the first building begin?

A. The first building, as I recall, was a brick building on this particular lot.

Q. That is the one you have described as being a distance of 195 feet northeastward from the northeast side of Tioga Street; is that right?

A. Yes.

Cross-examination.

By Mr. Ambler:

Q. You gave us a description of a frontage of 92 feet of the Glenwood Distilling Company. Now, is that all of the frontage of the property of the Glenwood Distilling Company?

COLLOQUY

The Court: May I ask you a question here? I am afraid counsel are making the same mistake that is very often made in the trial of cases of assuming that the jury and the [fol. 117] trial judge know as much about the facts in the case as you do yourselves, and consequently you ask questions that are clear in your mind but are not clear in ours.

Now, I would like to know as a fact whether the premises —I assume that some premises were damaged by fire— whether the buildings that were damaged by fire were on the mortgaged premises in the name of Kennedy. Is that a question in the case?

Mr. Ambler: That is partially in the case, because of this: that there is a second mortgage on a larger tract——

The Court: I understand that.

Mr. Ambler: —and part of the buildings, undoubtedly, were not on the Kennedy tract.

The Court: But were some part of them on the Kennedy tract?

Mr. Ambler: Some of them may have been.

Mr. Shapiro: And we have agreed, if there be a verdict, that it would be for $11,000.

The Court: No; you have not agreed to a verdict, but you have agreed that the fire loss was to be $11,000.

Mr. Shapiro: If that is the only question, I am satisfied to stand by the cross-examination, but I didn't understand by that agreement that we made that there was to be anything other than the $11,000, if we proved that the policy of insurance covered our mortgage. I want to understand that now, if the Court pleases.

The Court: The jury will have something to decide at least, and naturally they will want to understand what they [fol. 118] are deciding before they undertake to decide it. I would like to get clear in our minds the question of whether the property was on the mortgaged premises or whether it was not. Is it a part of the defense in this case that the property, which was damaged by fire, was not on the mortgaged land?

Mr. Ambler: No; but there is this much about it: we say that it was not only on the mortgaged land, but it was also on land that was not mortgaged. So, I think that the burden is on them to establish what was on their land, if they have a case.

The Court: I understand that there is a street known as Cedar Street, and there is another street known as Tioga Street. Now, they run at right angles, there is a corner and there is, of course, land there. Now, a part of it is land, 60 feet wide, which was included in this mortgage?

Mr. Ambler: Yes.

The Court: According to your contention and what you are asking the jury to find—was the building that was damaged by fire on that 60 feet?

Mr. Ambler: Yes; there is no question about that.

The Court: Wholly or in part only?

Mr. Ambler: That building was entirely within that 60 feet, but there were other buildings destroyed.

The Court: I know, but the damage done by the fire you have agreed was $11,000. Was that property on the mortgaged lot?

Mr. Ambler: If I have agreed to that, then—I thought my [fol. 119] agreement was that the entire fire loss there

amounted to $11,000, because that was the evidence I had here to sustain it, part of which belonged to the mortgage and part of which belonged otherwise.

The Court: As I understand the agreement, you do not have anything to do with that question.

Mr. Shapiro: This policy is made out for a property on the north side of Cedar Street.

The Court: Then you are pretty well down to almost a question of law, as to whether or not these insurance companies, when they cancelled these policies, had a right to cancel them?

Mr. Shapiro: That is correct, your Honor. This policy reads the properties on the north side of Cedar Street north of Tioga. There is no property on the north side of Cedar Street north of Tioga, and that's why this defense was raised. That is what I am showing your Honor now.

Mr. Schell: We are not raising any question about that?

Mr. Ambler: That is settled.

Mr. Shapiro: Is that settled?

Mr. Ambler: That is settled.

Plaintiff rests.

[fol. 120] Evidence on Behalf of Defendants

Mr. Schell: It seems to me, if your Honor pleases, that we are entitled to a non-suit under the evidence of Mr. Kennedy.

The Court: Well, are we down to the question of the power and right to cancel?

Mr. Schell: I think the sole question is this, sir; if I take out a policy of insurance with a mortgagee clause attached, I have the right to surrender that policy of insurance with the consent of the mortgagee for cancellation.

There is no requirement in the law that a mortgagee shall be given any notice if he consents to the cancellation. The clause, which Mr. Shapiro has in mind, is where the company attempts to cancel, in which event it must give five days' notice to the owner and ten days' notice to the mortgagee, but there can be no question that the owner and the mortgagee can surrender the policy at any time, and when they do the policy reaches its end.

Under the testimony of Mr. Kennedy, he knew for quite some time prior to this fire that these policies were to be surrendered to Mr. Winnet for cancellation.

The Court: Am I correct in understanding that the sole question left in these cases is whether or not the policies sued upon were in force at the time of the fire or whether before that time they had been cancelled and annulled?

Mr. Schell: Yes, sir; that is the sole question, your Honor.

[fol. 121] (Discussion off the record. A recess was taken until 2.00 o'clock p. m.)

After recess.

Present: Parties as before noted.

(Motion denied. Exception noted for defendants by direction of the Court.)

Harry Gottlieb, having been duly sworn, was examined and testified as follows:

By Mr. Schell:

Q. Mr. Gottlieb, are you connected with the Corn Exchange National Bank & Trust Company?

A. I am.

Q. And what is your official position with that institution?

A. I am assistant cashier.

Q. And how long have you been employed with the Corn Exchange National Bank & Trust Company?

A. About 14 years.

Q. Did the Corn Exchange National Bank & Trust Company own a mortgage secured upon the property of the Glenwood Distilling Company?

A. It did.

Q. How did they acquire title to that mortgage?

A. The mortgage was an asset of the Union Bank & Trust Company, which the Corn Exchange took over for liquidation in April of 1929.

Q. Do you have that mortgage?

A. Mr. Winnet has that.

Q. I show you a mortgage, Glenwood Industrial Distill-[fol. 122] ing Company to Daniel A. Brophy Jr., et ux., dated October 1, 1927, in the principal sum of $35,000, and recorded at Philadelphia in Mortgage Book J. M. H. 6664, page 192, together with an assignment, Daniel A. Brophy Jr. and wife to Union Bank & Trust Company, and ask you whether or not that mortgage came into your possession as

one of the assets of the Union Bank & Trust Company at the time you took it over in liquidation.

A. Unfortunately, I didn't bring the collateral with me. I can't identify it, but if I can refer to some records here——

Q. Yes; refer to your records, and see at the same time if you find that that particular mortgage is in your records, which came into your possession.

Mr. Shapiro: I will admit that this mortgage went into their possession, if that will save time, and covered the property in question.

By Mr. Schell:

Q. Now, what if anything was done by the Corn Exchange National Bank, as liquidator of the Union Bank & Trust Company, to place insurance upon this property, Mr. Gottlieb?

A. We placed an order through Dennis J. Sweeny & Company for, I think it was, $20,000 of fire insurance on this property.

Q. Did you place the order?

A. I did.

Q. Would you recognize the policies if you saw them?

A. Well, I had them in my hands for a brief time.

Q. Did you make any memorandum of the policies?

A. I did.

[fol. 123] Q. Will you just refer to your memorandum, and tell me what the policies were, and their amounts? Never mind. It is admitted by counsel for the plaintiff that the policies referred to by the witness are the policies issued in this case and subsequently reduced to $17,500 by cancellation.

A. There was one cancellation, a reduction from five to twenty-five hundred. I have a record here (indicating).

By Mr. Schell:

Q. Who represented the Corn Exchange National Bank & Trust Company as counsel in this matter?

A. N. S. Winnet and B. I. DeYoung.

Q. State whether or not any proceedings were taken by the Corn Exchange National Bank, as liquidator of the Union Bank & Trust Company, to foreclose the mortgage secured upon this property?

A. Proceedings were started.

Q. Do you know when the sale of the property was had, the sheriff's sale?

A. I have a letter from Mr. Winnet, where he says they were coming up on Monday, December 7th.

Q. Subsequent to the sale of this property, what, if anything, was done by you personally so far as this insurance was concerned?

A. Mister—I got in touch with Thomas Sweeny of Dennis Sweeny & Company——

Mr. Shapiro: I object to any conversation between this witness and the agent that he has named—the brokers that he has named. I don't mind him telling what he did.

The Court: Did the broker represent the insurance company?

[fol. 124] Mr. Schell: They were the writing agents. They were not the brokers. They were the writing agents.

The Court: Of course, if it was merely his instruction to do something, it would not be evidentiary, but if what he was doing was dealing with the insurance company, then I think it is permissible.

Mr. Shapiro: What he said and what somebody said in the absence of the plaintiff would not be admissible.

By Mr. Schell:

Q. Never mind any conversations. I am not particularly interested in those. What, if anything, was done so far as these policies in suit are concerned by you? What did you do with them?

A. I ordered $20,000 worth of insurance, and when I received the policies I sent them to Mr. Winnet.

Q. After that what was done with reference to the surrender of those policies?

Mr. Shapiro: By him?

By Mr. Schell:

Q. By you; yes.

A. I sent them to Dennis Sweeny Company on February 16th for cancellation.

Q. On February 16th——

A. 1932.

Q. 1932?

A. Yes, sir.

Q. Was the return premium paid under those policies?

A. The return premium was paid to us under date of February 27, 1932.

[fol. 125] Q. Have you any record there, which shows the amount of the return premium?

A. I have a record here which shows the amount of the return premium. I have a letter from Dennis Sweeny & Company.

"Enclosed find check in amount of $114.19 being return premium under policies No. 22132 Connecticut Fire Ins. Co., 25322 Springfield F. & M. Ins. Co., 22611 Ætna Insurance Co., and L. 331072 Liverpool & London & Globe Ins. Co. covering property of Glenwood Industrial Distilling Company cancelled and surrendered."

Mr. Schell: I offer in evidence, if your Honor pleases, the letter referred to by the witness, where with the check for the return premium was forwarded to the Corn Exchange National Bank & Trust Company.

Mr. Shapiro: I object to the letter. If this witness will tell me to whom the checks were made payable and what was done with them, I will raise no objection to the fact that the checks were not produced. I do not want to be technical about it. I am perfectly satisfied to acknowledge that I know there was a return premium to these people, but I don't think we should be bound by the letter.

The Court: Well, it is merely a letter accompanying the check, which paid the return premium.

Mr. Shapiro: It does not show to whom the check was payable.

Mr. Schell: I will have the check here in a minute.

[fol. 126] The Court: The implication is that the payee was the party to whom the letter was addressed.

By Mr. Schell:

Q. I show you a check, dated February 27, 1932——

The Court: Wait a minute. There is an objection on the record that has not been disposed of. Let us clear up the record. Is the objection withdrawn or the offer withdrawn?

Mr. Schell: No; I do not withdraw the offer.

Mr. Shapiro: I press the objection.

(Objection overruled. Exception noted for plaintiff.)

(Letter in question marked Defendants' Exhibit 2. The said exhibit reads as follows:

DEF. EXHIBIT 2

"Phones (Bell Lombard 2325.
(Keystone Main 5875.

Dennis J. Sweeny & Co., Agents,

333 Walnut Street, Philadelphia, Pa.

The Connecticut Fire Insurance Company of Hartford, Conn.

Connecticut Underwriters Department

February 27th, 1932.

Corn Exchange Nat. B. & T. Co., Mr. Harry Gottlieb, Asst. Cashier, 2nd. & Arch Streets, Philadelphia, Pa.

DEAR SIR:

Enclosed find check in amount of $114.19 being return premium under policies No. 22132 Connecticut Fire Ins. Co., 25322 Springfield F. & M. Ins. Co., 22611 Ætna Insur- [fol. 127] ance Co., and L. 331072 Liverpool & London & Globe Ins. Co. covering property of Glenwood Industrial Distilling Company cancelled and surrendered.

Yours truly, Dennis J. Sweeny Co.")

TBS.G

By Mr. Schell:

Q. Now, I show you a check dated February 27, 1932, to the order of the Corn Exchange National Bank & Trust Co., for $114.19, and ask you whether that is the check that you received with that letter of February 27th, which has just been offered in evidence.

A. I should say it is.

The Court: Now, let us get the record straight. It has just occurred to me that the offer is premature. If the objection is on the ground that the offer of the letter is premature, I will have to sustain the objection. If it is on the ground of its materiality, as I assume it is, I will let the ruling stand.

Mr. Shapiro: It is on the materiality, your Honor.

Mr. Schell: I offer, if your Honor pleases, the check of February 27, 1932, in the amount of $114.19, the payee Corn Exchange National Bank & Trust Company, which is the check identified by the witness as the check which accompanied the communication of February 27th.

(Check in question marked Defendants' Exhibit 3. The said exhibit reads as follows:

DEF. EXHIBIT 3

[fol. 128] "Established 1873. No. 1753.

Dennis J. Sweeny & Co.

Insurance

333 Walnut Street

Philadelphia, February 27th, 1932.

Pay to the order of Corn Exchange National Bank & Trust Co. $114.19.

Registered A-885 $114 and 19 Cts. Dollars.

To the Ret. Prem. 22132, 25322, 22611 & L.33072 cancelled.

Corn Exchange National Bank and Trust Company. 3-18. Philadelphia.

Maurice M. Gallagher, Treasr.
Thomas B. Sweeny Vice Pres.

(Endorsement:) Corn Exchange National Bank & Trust Co. Office-B. (Peforation) Paid 2-29-32.")

By Mr. Schell:

Q. Now, I show you a letter——

The Court: Does the jury understand that the return premium check referred to was the return premium on the policies in suit?

Mr. Schell: Yes.

Mr. Shapiro: I have said that I raise no objection to that.

By Mr. Schell:

Q. I show you a letter, dated February 16, 1932, addressed to Dennis J. Sweeny & Company, and ask you whether or not you sent that letter.

A. I did.

[fol. 129] Q. Did you send the policies with that communication?

A. I did.

Q. The policies there named in that letter?

A. Yes, sir.

Mr. Schell: I offer in evidence, if your Honor pleases, the letter of February 16, 1932, signed by the witness upon the stand, and forwarded to Dennis J. Sweeny & Company for cancellation of the policies in suit.

(Communication in question marked Defendants' Exhibit 4. The said exhibit reads as follows:

DEF. EXHIBIT 4

"Corn Exchange National Bank and Trust Company

Philadelphia February 16, 1932.

Please Address Reply to Dennis J. Sweeny & Company, 333 Walnut Street, Philadelphia, Pennsylvania.

Glenwood Industrial Distilling Company

GENTLEMEN:

I send you herewith the following policies, and would appreciate your cancelling the same, and sending us a check for the return premium.

Yours very truly, Harry Gottlieb, Assistant Cashier.

HG/gs

No. 22132—The Connecticut Fire Ins. Co., $2500.
25322—Springfield Fire & Marine Ins. Co., $5000.
22611—Ætna Insurance Co., $5000.
331072—The Liverpool, London & Globe, $5000.")

[fol. 130] By Mr. Schell:

Q. Do you have the check, which paid the premiums for these policies?

A. I have.

Q. Will you produce it, please?

(Witness complies.)

Q. I show you a check, dated September 16, 1931, to the order of Dennis J. Sweeny & Company, in the sum of $456.75, and ask you what the check was in payment of.

A. The check was in payment of the premiums due under the policies.

Q. The policies which are here in issue?

A. So I understand.

Mr. Schell: I offer that check in evidence, if your Honor pleases, and there is no objection to substituting a photostat.

(Check in question marked Defendants' Exhibit 6. The said exhibit reads as follows:

DEF. EXHIBIT 6

"No. 4285. Philadelphia, Sept. 16, 1931.

Corn Exchange National Bank and Trust Company

3-18.

Third and Arch Sts.

Cashier's Check

Pay to the order of Dennis J. Sweeny & Co. $456.75.

Exactly Four Hundred Fifty Six Dollars 75 cents, exactly —— Dollars.

J. Fairbanks, Asst. Vice-President. —— ——, Asst. Cashier.

(Endorsement:) Pay to the order of Corn Exchange National Bank & Trust Co., Dennis J. Sweeny & Co. (Perforation:) Paid 3-18.")

[fol. 131] Cross-examination.

By Mr. Shapiro:

Q. Mr. Gottlieb, so that the jury can understand it, I will take you back to the mortgage for the time being. That was not an original mortgage on which the bank had loaned money—the Union Bank? That was collateral security, wasn't it?

Mr. Schell: That is objected to as irrelevant.

(Objection overruled. Exception noted for defendants by direction of the Court.)

A. That's correct.

By Mr. Shapiro:

Q. Now, Mr. Gottlieb, at the time that this insurance transaction occurred, the property in question, on which this mortgage was a lien that you are talking about—the mortgage with the Union Bank—the taxes for several years had not been paid, is that right?

Mr. Schell: That is objected to.
The Court: I do not see the relevancy of that.

By Mr. Shapiro:

Q. Let me put it the other way. Is it not a fact that the reason this property was insured was because you and Mr. Kennedy, by his counsel or himself, had entered into an arrangement under which he agreed not to foreclose this mortgage if your company would pay the taxes and arrearages, and he would allow you, in turn, an opportunity to foreclose, and then you would insure the property; is that right or not?

[fol. 132] Mr. Schell: I object to that. It is wholly irrelevant and immaterial—any arrangement outside of this insurance.

The Court: I will admit it so far as it tends to show that somebody, other than the Corn Exchange National Bank, had an interest in these policies.

(Exception noted for defendants by direction of the Court.)

The Witness: If there was any such arrangement and understanding, it was between Mr. Winnet and Mr. DeYoung and Mr. Kennedy. I can't answer that.

By Mr. Shapiro:

Q. Let us go back further then. Is it not true that the Glenwood Industrial Distilling Company owed you money, as a result of which—when I say "you", I mean the Union National Bank—and as a result, this mortgage, among other things, was given as collateral security on the loan?

A. That's correct.

Q. Is it not true that the proceeds of that check, that you have referred to here as the premium, was credited to the account of the borrower in that particular case?

Mr. Ambler: I object to that.

The Court: What is the objection?

Mr. Ambler: The objection is that the insurance company had no notice of what they did. The policy speaks for itself, as to where the premium came from, and the insurance company had no contractual relationship.

The Court: I may not have grasped the point, but I assume [fol. 133] that the purpose of the cross-examination is to show that somebody, other than the Corn Exchange National Bank, had an interest in these policies and, ergo, they could not be surrendered and cancelled without their concurrence.

Mr. Schell: If your Honor pleases, that might all be very interesting had this action been brought in the name of the Glenwood Industrial Distilling Company, but you are now putting a dead horse of record.

The Court: No; I am admitting it for one purpose, to show that somebody, other than the Corn Exchange Bank, had an interest in those policies.

A. Your question was whether the borrower was credited with the return premium?

By Mr. Shapiro:

Q. Yes.

A. I believe not. I don't think that the borrower received any direct credit.

Q. Was any charge made for the original premium against the borrower?

A. There was not.

Q. There was not?

A. No.

Q. Have you any records to show that or is that just your impression?

A. I have a record here. Shall I read it?

Q. Let me see it. I have no objection to your reading it, but I think you had better let your counsel see it first.

Mr. Schell: I don't see any relevancy in that.

The Court: Let us not anticipate. It is not being offered in evidence. The witness was asked whether he had a rec- [fol. 134] ord, and he said he had, and he has produced that record.

Mr. Shapiro: And he said, "Shall I read it?"

Mr. Schell: I say that he can refresh his recollection from the record and state whether or not——

The Court: Well, the paper is not offered in evidence. The other side can not offer it in evidence.

Mr. Schell: I don't see why we should get in the record by the witness reading into the record things that don't pertain to this case.

The Court: He has told us what was done, and he was asked whether he had a record or whether that was a mere recollection of his own, and he says he has a record, and he has produced it.

By Mr. Shapiro:

Q. Mr. Gottlieb, I want to go back a step further. What was the total premium that was paid originally for the three policies or four, whatever it was? It was $20,000. What was the total premium paid?

A. If I recall cor-ectly, we received a bill, which I have here, for $522. Before that bill was paid, there was a cancellation of $2,500.

Q. That reduced the bill to how much?

A. To $456.75.

Q. Now, the Corn Exchange didn't pay all that out of its own fund, did it?

A. It did.

Q. Don't you have a record that shows that you received $95 from someone else, or $97?

Mr. Ambler: If the Court pleases, my objection is based on the fact that that is not relevant unless it has been [fol. 135] brought to the notice of the insurance company.

The Court: I understood, as part of the testimony that the Corn Exchange had paid this premium. I understand this cross-examination is an effort to show that that was a mistake, that there was $95 for which they did not pay.

(Objection overruled. Exception noted for defendants by direction of the Court.)

By Mr. Shapiro:

Q. Can you answer that question?

A. We got a check for $95.26, which was considered a credit against that payment.

Q. Was that the net amount that you paid? What was the amount of the check, less the 95?

A. Plus some other amount we paid.

Q. What was that other amount that you paid? I am talking about the premium. You told us that the total premium, which you paid, was $456.75; is that right?

A. Yes.

Q. But against that someone else gave you some money. How much?

A. $95.26.

Q. Who gave you that?

A. Mr. Winnet sent it to me.

Q. Whose check was it? It wasn't the insurance company's check?

A. I judge from my correspondence here that it was a check of Hoskins & Howell.

Q. Don't you know and can't you ascertain, if you don't know, from your own records that that check was sent to you—it was sent by Hoskins & Howell, agents of an insur-[fol. 136] ance company which held the prior policies, and that the proceeds of this cancelled policy was what this check represented?

A. That's correct.

Q. And that was the policy of the Glenwood Company, and your records show that?

A. I can't answer that. I have here a letter mentioning checks, but it doesn't say anything about that.

Q. Is that the only letter you have on the subject?

A. Yes, sir; that's the only letter I have here.

Q. But your records do show that that check was the proceeds of this prior insurance policy; is that correct?

A. Yes, sir; it is.

Q. Didn't you get a letter through Winnet by Kennedy, in which that check is described as the proceeds of the insurance on that property—previously covering the property in question?

A. Mr. Winnet's letter so describes it.

The Court: When you say "proceeds of the insurance," you mean unearned premium?

Mr. Shapiro: In counsel's view, the unearned premium, as they call it.

By Mr. Shapiro:

Q. And this transaction was handled for the Corn Exchange Bank by Mr. Winnet and Mr. DeYoung?

A. That's right.

Q. Mr. DeYoung is counsel of record for you and Mr. Winnet is associate counsel with Mr. DeYoung: is that right?

A. That's right.

Q. And the insurance matter, which Mr. Winnet was handling, he was handling on behalf of the Corn Exchange National Bank?

[fol. 137] A. That's right.

Q. And afterwards, instead of completing the foreclosure proceedings and taking title to the property, the Corn Exchange decided to abandon that property and save itself as much as it could; is that right?

A. That's right.

Q. In fact, you determined to cancel that policy? When I say "you" I mean the Corn Exchange.

The Court: Oh, that would go without saying. If they abandoned the property, they would not be interested in the insurance, and they would want to get the unearned premium, of course.

A. That wasn't the reason—that wasn't the reason for the cancellation of the policies.

By Mr. Shapiro:

Q. Didn't Mr. Winnet write you and tell you, as a matter of fact, that since you were abandoning the property you might as well get the value of the premium and that you should cancel the policy?

A. That's mentioned in the letter.

Redirect examination.

By Mr. Schell:

Q. You don't know, Mr. Gottlieb, from whom Mr. Winnet got the check of $95.26, do you?

Mr. Shapiro: That is objected to. He can't cross-examine his own witness.

The Court: No; you brought that out.

Mr. Shapiro: I do not object to his asking the question, whether he knows. I object to the form of the question.

[fol. 138] By Mr. Schell:

Q. Do you know from whom he got the check?

A. From the letter I have in my file, I would say "yes".

Q. From whom?

A. John M. Kennedy, 3rd.

JOHN M. KENNEDY, 3RD, recalled.

By Mr. Schell:

Q. Mr. Kennedy, I show you a letter, dated August 4, 1931, addressed to John M. Kennedy, 3rd, from Hoskins & Howell, and ask you whether you received that letter with the check enclosed?

A. Yes, sir.

Q. And this notation in pen and ink at the bottom—is that in your handwriting?

A. Yes, sir; it is. That's my signature at the bottom (indicating).

Q. Will you state what you did with that letter and check?

A. I enclosed the letter in an envelope and the check and sent it to Mr. Winnet.

Mr. Schell: I offer in evidence, if your Honor pleases, the letter dated August 4, 1931, from Hoskins & Howell to Mr. John M. Kennedy, 3rd, enclosing check to his order for $95.26, and Mr. Kennedy's notation on the bottom, addressed to Mr. Winnet, forwarding the check to him.

(Paper in question marked Defendants' Exhibit and not handed to the stenographer for transcribing into the record.)

[fol. 139] Cross-examination.

By Mr. Shapiro:

Q. Do you know whose check that was?

A. No, sir.

Q. It came to you from Hoskins & Howell, didn't it?

A. That's right.

Q. And you say that you turned that over to Mr. Winnet. Why?

A. By mail. Because at that time Mr. Winnet represented to me—not the owner, but the second mortgagee, covering the property, and they were furnishing, I believe, at that time—I will have to check the date—insurance.

Q. Look at it. In other words, you mean to say that you sent that letter to him because you had a first mortgage on the property and they had a second mortgage?

A. That's right.

Q. And they agreed if you didn't foreclose that they would pay your interest on the first mortgage and would furnish you with insurance; is that right or not?

Mr. Schell: I object: This certainly is not cross-examination, because I only asked him whether or not he sent the check to Mr. Winnet.

(Objection overruled. Exception noted for defendants by direction of the Court.)

A. May I hear the question again?

By Mr. Shapiro:

Q. You sent them that check because you were the first mortgagee and they were the second mortgagee, and you had threatened to foreclose, and they agreed if you didn't [fol. 140] foreclose that they would pay the taxes and the arrears, and they would furnish you with an insurance policy; is that right?

A. That's not right, exactly.

Q. You state it your own way.

A. I have some correspondence here. My attorney, Joseph B. Quigley, was in the course of foreclosure when he discovered a second mortgage. He approached the Corn Exchange National Bank, and they requested him, for the time being at least, not to proceed any further with his foreclosure, until he heard further from them. They in the meantime, I believe, paid some interest. I think I have a letter here, yes. May I read it?

Q. Let me see it. I have no objection to your reading it, neither has your counsel, but what I want to know is whether after reading these letters, you have refreshed your recollection sufficiently to enable you to answer my question.

A. Well, I haven't read them yet. Just a minute.

Q. All right. Suppose you do that. It will save some time.

A. As regards arrangements, with my attorney, Mr. Quigley, and myself, the Corn Exchange stated that they would take care of the interest then due on the mortgage. They also said that they would take care of the taxes, which they never did. As to the fire insurance, I don't believe that any great pressure was brought either by my attorney or by myself.

Q. Do you mean to say——

The Court: Aren't we getting a little far afield? I have only admitted this for the purpose of showing whether any-

body else than the Corn Exchange had any interest in these policies; that is, the mortgagee policy. Now, you are asking him about other matters.

[fol. 141] Mr. Shapiro: No; I am asking him to prove that he had an interest.

The Court: I am not finding fault with your question, because I admitted it, but I understand that the witness now has a recollection that they did agree to do certain things, but I understand he has no recollection that any kind of fire insurance was to be put up.

Mr. Shapiro: May I answer your Honor by saying this: the defendants take the position that no one but the Corn Exchange had an interest in this policy, by virtue of the particular phrasing of the policy. I want to show that this man had an interest.

The Court: Suppose you ask him a direct question relating to the insurance policy?

By Mr. Shapiro:

Q. Mr. Kennedy, isn't it true that you sent the check that has been referred to by Mr. Schell, and of which there appears a notation on a letter that I show you—isn't it true that you sent that check because the Corn Exchange National Bank, among other things, had agreed to see to it that you were covered with fire insurance; isn't that so?

A. They had furnished other fire insurance, and because they had furnished other fire insurance, I felt obligated to return the premiums that had been given to me. There was also the agreement which I had with the original Glenwood Distilling Company owners to the effect that they would pay for any insurance that I procured, but they were not under obligation to cover me fully with insurance, the reason for that being that the risk was a very hard one to get insurance on.

[fol. 142] Q. But the question I am asking you is this: isn't it true that at the time you sent that check, you sent it to Mr. Winnet because the bank, among other things, had agree to see to it that you were covered with fire insurance?

A. Because the bank had furnished me with other insurance, and they were entitled to that rebate—yes.

Q. Wasn't it also sent because they had agreed to see to it that you were covered with fire insurance—the Corn Exchange?

A. Not entirely, according to my recollection.

Q. Do you recall giving me a statement in connection with this very matter we are talking about?

Mr. Schell: I object to that. He can't cross-examine this plaintiff.

The Court: You called him as a witness.

Mr. Schell: It is the plaintiff that is being called, if your Honor pleases, and certainly this cross-examination is going way beyond the field of anything I asked him. I limited it to one question, namely, did he send the check to the Corn Exchange Bank.

The Court: I have not heard him answer it.

Mr. Schell: He said because they had given him other insurance and had paid the premium.

The Court: Yes; and then he was asked the further question.

The Witness: Yes, sir; I was hoping that they would, but I was frank to believe they couldn't get full insurance coverage. I never could.

[fol. 143] By Mr. Shapiro:

Q. I will repeat the question. Do you remember giving me a statement concerning this very thing that we are talking about now?

A. I remember anything that I gave you, sir.

(Paper marked for identification Plaintiff's Exhibit 7.)

By Mr. Shapiro:

Q. I show you a paper, which has been marked for identification Plaintiff's Exhibit 7, and ask you whether or not that bears your signature.

A. Yes, it does.

Q. Will you read it and tell me whether or not that is the statement you gave me?

A. I can tell you at at once, without reading it, that it is.

Q. Well, tell me.

A. It is.

Q. That statement is in the same condition now as when you gave it to me, outside of being torn at the top, where it was in my files?

A. I believe so; yes, sir.

Q. There's a change, with some ink interlineation; is that yours or not?

A. I don't know whether that's mine or yours.

Q. That is N-o-c-h-e-m. Do you know whether that's yours or not?

A. No; frankly, I don't.

Q. Didn't you in that statement state to me, dealing with this very thing or, rather, you wrote to me on May 16, 1932: "I can't tell you much about it except that I know that when I was going to foreclose the mortgage on the property, Mr. Nochem Winnet, attorney for the Corn Exchange [fol. 144] Bank, agreed if I wouldn't foreclose that he would pay the interest on my mortgage and see that I was covered with fire insurance?" You wrote that, didn't you?

A. Quite so, sir.

Redirect-examination.

By Mr. Schell:

Q. That was in reference to the insurance which had been placed and which had been cancelled, concerning which you got the check and sent it to Winnet?

Mr. Shapiro: I object to the question.

The Court: The question is leading, Mr. Schell.

Mr. Schell: I don't think so, sir. I will call him as for cross-examination.

By Mr. Schell:

Q. May I ask you to what insurance that refers?

A. That referred—in my mind, at least—to any insurance that they were able to procure for me.

Q. And they had procured insurance sometime before these policies were obtained, on which you had received a check for return premiums?

Mr. Shapiro: That is objected to as leading.

(Objection sustained. Exception noted for defendants by direction of the Court.)

By Mr. Schell:

Q. You received a check for $95.26, did you not?

A. I did, sir.

Q. And you sent it to Mr. Winnet?

A. I did, sir.

Q. That was the return premium on what?

[fol. 145] A. On a policy cancelled through Hoskins & Howell, and a policy of sometime standing.

Q. And who had paid originally the premium for that policy?

A. So far as I know, the owners of the Glenwood.

Q. To what were you referring when you said that the Corn Exchange National Bank had paid the premiums and, therefore, you thought this money was due them and sent it to them?

A. To the best of my recollection, sir, that was for other policies that had been placed by them. Whether it was these policies under suit, I am not quite prepared to say.

Q. But there was insurance which they had placed?

A. Yes.

Q. And you felt that the premium was due them?

A. That's right, sir.

Q. And that is why you sent it?

Recross-examination.

By Mr. Shapiro:

Q. You said in your letter to me and I see here that they had agreed to place insurance, and when you got the cancellation value of the other policies, you sent it to them because you thought they were going to place you or had placed new policies for you; isn't that right?

A. That's right. May I enlarge on this point?

Q. Certainly.

A. The reason I am apparently quibbling is because I didn't believe they could furnish me full coverage nor was it, according to my recollection, the understanding that they would; that they would furnish me with what coverage they could.

[fol. 146] Q. That's right, and what you mean, when you got that check for $95, acting under the presumption that they would place such insurance as they could and would pay the premium, you sent him the check for the return premium?

A. Yes, sir.

Q. And because they were the mortgagees under the other policy; is that right?

A. Yes, sir.

By Mr. Schell:

Q. And prior to the time that the policies were presented for cancellation, Mr. Winnet offered the policies to you and you didn't want to buy them; is that correct?

Mr. Shapiro: That is objected to. It is not redirect examination in the first place, and it is a leading question.

The Court: It is leading, Mr. Schell.

By Mr. Schell:

Q. Prior to the time that these policies were surrendered for cancellation—that we are talking about here—did Mr. Winnet offer them to you?

A. Yes; but I didn't know what policies they were. I saw them today, I believe, for the first time.

Q. But is it or is it not a fact that you declined to purchase any insurance?

Mr. Shapiro: Objected to.

(Objection overruled. Exception noted for plaintiff by direction of the Court.)

A. It is.

[fol. 147] Nochem S. Winnet, having been duly sworn, was examined and testified as follows:

By Mr. Schell:

Q. You are a member of the bar?

A. I am.

Q. And have been for how long?

A. Eleven years.

Q. Did you represent the Corn Exchange National Bank & Trust Company in connection with the foreclosure of a mortgage on the Glenwood Distillery Company property?

A. I did.

Q. What, if anything, did you have to do with the placing of the policies of insurance here in suit?

A. Mr. Kennedy had asked for insurance, because there had been a cancellation, and I finally asked Mr. Gottlieb to get the insurance as mortgagee.

Q. Now, will you state whether or not at the time this insurance was obtained, foreclosure proceedings were pending upon the mortgage which the Corn Exchange National

Bank held as liquidator of the Union Bank & Trust Company?

A. There was. We had started a foreclosure suit.

Q. After the property had been sold at sheriff's sale, what was done with these policies with reference to surrender for cancellation?

A. Will you repeat that question?

Q. After this property had been sold at sheriff's sale, did you discuss with Mr. Kennedy any question of the surrendering of these policies for cancellation?

A. Yes; I did. I tried to get him to buy the policies. We determined that there was no equity, and we were not getting the title on the sheriff's sale—we just decided to [fol. 148] abandon our bid, and I asked him if he wanted the policies, and he said how much would they cost, and I told him, and he said he wasn't going to spend another cent on the property, and I said I was going to cancel them. He says, "You do what you think best. I am not going to spend another cent on them".

Q. Following that did you surrender the policies through the Corn Exchange?

A. I sent them to Mr. Gottlieb.

Q. Did you advise Mr. Kennedy?

A. I advised Mr. Kennedy sometime after that, telling him I was going to cancel the policies again. Our previous meeting was oral—I mean, we talked this over; I don't think it was over the telephone, as Mr. Kennedy said; although it may have been. I think it was in my office and then, later on, I wrote a letter, and I received no reply to that letter, as far as my recollection goes.

Q. At the time of the oral conversation, what did Mr. Kennedy say when you advised him that you were going to surrender these policies or intended to surrender them?

A. He said, "You do whatever you think is necessary for your client."—the substance of it: he said, "You do whatever you think is necessary for your client."

Q. Do you have a copy of the letter on the subject of this conversation?

A. I believe I handed it to you, Mr. Schell. I believe it has been identified already, if I am not mistaken.

Q. Is that it (indicating)?

A. Yes; that's a copy of the letter that I wrote to Mr. Kennedy on February 6th. Do you want me to read it?

Q. Yes; read it.

[fol. 149] Mr. Shapiro: I object. There has been no proof that this letter was received. He couldn't answer the question whether he received it or not.

The Court: He said that he could not say one way or the other or he could not recall.

Mr. Schapiro: That is right, your Honor.

Mr. Schell: Are you objecting to it?

Mr. Shapiro: No; I am not objecting to it.

By Mr. Schell:

Q. Do you have a copy of a letter—is this the only copy of the letter which you have, following your conversation with Kennedy?

A. It is.

Q. Was there any other correspondence relative to these policies?

A. I think this is the only one, Mr. Schell, after our oral conversation.

Q. And then, following this communication, what did you do with the policies?

A. I don't know how soon, but sometime after that I sent them to Mr. Gottlieb; to the bank directly.

Mr. Schell: I offer in evidence this letter heretofore marked Defendants' Exhibit 1 for identification.

DEF. EXHIBIT 1

The said exhibit reads as follows:

"February 6, 1932.

Mr. John M. Kennedy, 3rd, Widener Building, Philadelphia, Penn.

Re Glenwood Industrial Products Company

[fol. 150] DEAR MR. KENNEDY:

I was wondering whether or not you have covered the property with the necessary insurance.

Since we decided to abandon our bids at the Sheriff's Sale, I am handing the various policies which were in my possession back to the Bank.

Very truly yours,"

NSW/ES.

Cross-examination.

By Mr. Shapiro:

Q. Didn't you deal with Kennedy's attorney in this matter at one stage of the proceedings?

A. Originally, Mr. Quigley. He was contemplating foreclosure proceedings.

Q. Isn't it true that you and Mr. Quigley agreed—you on behalf of the bank and Mr. Quigley on behalf of Mr. Kennedy—that if your company would pay up either all or a portion of the taxes, pay his interest, and furnish fire insurance, that he would forego foreclosure proceedings; isn't that true?

Mr. Schell: I object.

Objection overruled. Exception noted for defendants by direction of the Court.)

A. That is so, sir.

By Mr. Shapiro:

Q. Is it not true that after he had foregone his foreclosure proceedings and your firm had instituted foreclosure proceedings, you came to the conclusion—you and the bank—that since Kennedy had a first mortgage of $25,000 and yours was an additional second mortgage, the property was not worth more than the first mortgage and it was folly for you to spend any more money; isn't that right?

A. That's right.

[fol. 151] Q. And isn't it true in order to save as much money as you thought you could out of this bad bargain, you and the bank determined that you would cancel the policy; isn't that right?

Mr. Schell: I object.

The Court: I do not see where we are concerned with that.

(Question withdrawn.)

By Mr. Shapiro:

Q. Isn't it true that at no time in any of your discussions with Mr. Kennedy did he give you his consent, so far as he was concerned, to cancel the policies? Isn't that true?

Mr. Schell: That is objected to.

The Court: The trouble is you are usurping the functions of the jury. Now, ask him what Mr. Kennedy did.

By Mr. Shapiro:

Q. Is it not true that Mr. Kennedy said, when you told him that you were thinking of cancelling these policies, that so far as he was concerned he would not pay any more money and in so far as he was concerned, you could do what you thought was best for the interests of your client?

A. That's the substance of it.

Q. Did he ever at any time tell you that you could cancel all these policies?

A. He never did.

Q. Isn't it true that it would have been necessary for Mr. Kennedy to put up some $400 to carry that policy or, at least, the insurance; isn't that right?

[fol. 152] A. Yes. I forget the exact value.

Q. Isn't it also true that the Corn Exchange didn't put up all of the original premium? Isn't that true?

Mr. Schell: I object.

(Objection sustained. Exception noted for plaintiff by direction of the Court.)

By Mr. Shapiro:

Q. Did you ever represent Mr. Kennedy in this transaction?

A. No, sir.

Q. And did you ever act as his counsel in this matter?

A. Oh, no—no, sir.

Q. And at the time that you told him—the first conversation—that you told him that you were going or you contemplated cancelling the policies, they had not been cancelled, had they?

A. No, sir; they had not been.

Q. As a matter of fact, when you wrote the letter, which has been offered in evidence, you didn't say to him that you had cancelled the policies, did you?

A. Just what the letter says.

Q. The letter says, "I was wondering whether or not you have covered the property with the necessary insurance. Since we decided to abandon our bids at the Sheriff's Sale, I

am handing the various policies which were in my possession back to the Bank."

A. That's right.

Q. That is correct?

A. That is correct.

Q. Did you at any time notify Mr. Kennedy that your bank [fol. 153] in writing, other than this (indicating), or verbally—had or was about to cancel the policies?

A. Never after that, to my recollection.

Q. Isn't it true the day after the fire or the day before the fire, Mr. Kennedy called you and asked you whether or not the insurance was still on the property, and you said you didn't know; you were not sure?

A. That's so. My recollection is that I tried to reach Mr. Gottlieb, but the bank was closed; it was some legal holiday; and I think Mr. Kennedy asked that I would call him back, and I called him back sometime after that.

Q. Isn't it true that after he called you, after the fire, that you told him there was some insurance, but you didn't know what insurance there was, and you would try immediately to find out?

A. Yes; I told him at that time. He called me on the telephone, and I said I would try and reach Mr. Gottlieb, since I didn't have the actual dealings with the insurance company.

Q. And you, yourself, didn't know at the time whether the intention had been carried out, did you?

A. I handed them to Mr. Gottlieb——

Q. Won't you answer my question? You didn't know at that time whether the intention to cancel had been carried out, did you?

A. That's right—I didn't.

THOMAS B. SWEENY, having been duly sworn, was examined and testified as follows:

By Mr. Schell:

Q. You are connected with what firm?

A. Dennis J. Sweeny & Company.

[fol. 154] Q. And your business is what?

A. Insurance agents and brokers.

Q. Were you the writing agents for the Ætna Insurance Company, the Springfield Fire & Marine Insurance Company, and the Liverpool & London & Globe Insurance Com-

pany, in the placing of this Insurance on the Glenwood Distillery plant?

A. That's correct.

Q. From whom did you receive the premium?

A. From the Corn Exchange.

Mr. Shapiro: Wait a minute. That is objected to.

(Objection overruled. Exception noted for plaintiff by direction of the Court."

By Mr. Schell:

Q. From whom?

A. From the Corn Exchange National Bank & Trust Company.

Q. Do you have any knowledge as to whether or not there had been any other contributors to the fund that made up that premium?

Mr. Shapiro: That is objected to.

(Objection overruled. Exception -oted for plaintiff by direction of the Court.)

A. Absolutely not.

By Mr. Schell:

Q. These policies were sent to your office for cancellation sometime in February of 1932?

Mr. Shapiro: That is objected to as a leading question.

The Court: It is leading.

[fol. 155] By Mr. Schell:

Q. Were these policies sent to your office in February of 1932 for cancellation?

Mr. Shapiro: That is objected to as stating a conclusion. What purpose they were sent for is a conclusion, a matter for this jury to decide. I have no objection to his asking whether they were sent to his office.

The Court: The fact may be a conclusion. It is a question as to the fact.

(Objection overruled. Exception noted for plaintiff by direction of the Court.)

A. Yes; they were sent for cancellations sometime in February, 1932.

By Mr. Schell:

Q. And accompanied by a letter, which I now show you, dated February 16, 1932?

A. That's correct. In fact, I think I went to the bank and got them for cancellation. Mr. Gottlieb called me on the 'phone and asked me to come over.

Q. And you got this letter at that time (indicating)?

A. Correct.

Q. Did your firm subsequently issue a check to the Corn Exchange Bank for the return premium under those policies?

A. We did.

Q. Is that the check (indicating)?

A. That's the check.

Cross-examination.

By Mr. Shapiro:

Q. What did you do?

[fol. 156] A. What do you mean, what did I do?

Q. When you said they were returned to you for cancellation, what did you do about it?

A. Well, we cancelled the policies.

Q. Tell the jury what that means. What did you physically do?

A. What did I physically do?

Q. Yes.

A. I didn't do anything physically, except to sign the check.

Q. What happened to the policies? Did they stay in your office?

A. No.

Q. That's what I want to know, what you did with them afterwards.

A. Each policy was sent to its respective company——

Q. Then what was done?

A. —and the check was drawn and sent to the bank.

Q. Then what was done? Was any notice sent out to anybody?

A. No.

Q. Did you say when you received that letter and the policies—February 16th, is that correct?

A. About that time; yes.

Q. What do you mean by "about that time"? Did you receive them or not on February 16th?

A. Either February 16th or the 17th.

Q. You didn't pay for them until February 27th; you didn't pay the return premium? Now, look at that check and tell me, as a matter of fact, whether you didn't cancel them until the 27th of February.

Mr. Schell: I object.

The Court: It is proper cross-examination.

[fol. 157] Mr. Schell: It means nothing, if your Honor pleases.

The Court: Well that may be.

By The Court:

Q. The question is when you paid that check.

A. February 27th that check was issued.

By Mr. Shapiro:

Q. Do you know whether the policies were cancelled on the day that the check was issued, or not?

(No answer.)

By Mr. Schell:

Q. If you don't know the date, say so.

A. No; I had better not answer.

By Mr. Shapiro:

Q. Look at the bottom of this policy, February 27th (indicating). Does that indicate to you that you received the letter on February 27th?

A. No; that is the time it was received at the home office.

Q. Whose stamp is that?

A. The company—the insurance company puts it on there.

Q. There is nothing in that to indicate that it was received on February 27th; is that right?

A. That is the date they were received at the home office at Hartford.

Q. Whose mark is this of March 7th on this policy that I show you?

A. I don't know whose is that. There is nothing on the back of them.

Q. I didn't ask you about the back. Do you have a mark [fol. 158] or stamp that you put on these policies when you receive them?

A. No.

Q. Don't you keep a record when you receive a policy for such an important thing as cancellation?

A. No.

Q. Then, you don't know whether you received the policies on the 16th or sometime between the 16th and the 27th?

A. The 16th or the 17th.

Q. The 16th or the 17th?

A. Yes.

Q. As soon as you received them, I assume that you want me to understand that you sent them up to the various companies; I don't mean just at the minute.

A. We don't drop everything.

Q. I understand that.

(No answer.)

The Court: Let me ask you for my own information and perhaps for the jury, does it make any difference whether they were cancelled on the 16th or 17th or 27th?

Mr. Shapiro: It might. The defendants have not finished their case yet, and it might.

Mr. Schell: I object to the testimony, because it is alleged in the statement of claim that this loss occurred sometime in March of 1932, and it is wholly irrelevant whether they were cancelled on the 15th, the 16th, or the 27th.

(Discussion off the record.)

The Court: The witness is not sure whether he received [fol. 159] them on the 16th or 17th. This witness can not tell us when it became effective.

Mr. Shapiro: Read the question.

(Question read.)

By Mr. Shapiro:

Q. Can you answer that question?

A. Yes. They were sent through in the course of a week or so.

Q. Is that your firm's check?

A. That's right.

Q. You sent your firm check to the Corn Exchange?
A. That's right.
Q. And that is all you know so far as this alleged cancellation is concerned?
A. Yes.

Defendants rest.

(Adjourned until Wednesday, April 18, 1934, at 10.00 o'clock a. m.)

Before Hon. Oliver B. Dickinson, J., and a Jury.

Philadelphia, Pa., Wednesday, April 18, 1934, at 10.00 o'clock a. m.

Present: Harry Shapiro, Esq., for the plaintiff; [fol. 160] Horace Michener Schell, Esq., and Harry S. Ambler, Jr., Esq., for the defendants.

(During the closing address of plaintiff's counsel, an objection was made as follows):

MOTION FOR WITHDRAWAL OF JUROR

Mr. Schell: Your Honor, I move for the withdrawal of a juror, based on the statement made by Mr. Shapiro, that when you went to school you learned certain things, but that since leaving school he has learned that if you have an insurance policy you are not sure that you will get the money when the loss occurs, because the insurance company employs counsel to prove that the policy is not in effect, and that statement is only made for the purpose of inflaming the minds of the jury.

The Court: Motion for withdrawal of a juror denied, and an exception is granted to the defendants.

JUDGE'S CHARGE TO THE JURY

Members of the Jury: When a case is presented to a jury it often has the appearance of great complexity, and it seems like a medley of questions. There is seldom, if ever, a case, when the fact situation is taken into our minds and analyzed, that it is as complex as it seems, and it will resolve itself into one or two, usually one, simple questions

of fact, and when you have determined that question you have determined the case.

Now, this case is no exception to that rule, and I think you will find when you come to analyze the facts in the [fol. 161] case, that this case resolves itself into one simple question of fact. When I say the question is simple, I do not mean to say that it is always easy to answer; it may be a very close question, but what I mean by calling it a simple question is that we understand what the question is.

Now, let us see if we can get into your minds what the one question is that you will be called upon to answer in this case.

The proposition in this case involves an insurance policy, and each of you know what that is. A number of years ago, although it seems to me like yesterday, an insurance policy was a simple contract to insure the owner of property against loss by fire, and if there was a mortgage on the property, there was an endorsement on the policy that the loss was payable to the mortgagee as interest may appear.

This contract of insurance was made with the owner of the property, and this endorsement amounted to saying that the fruits, if any, of the policy should be received by the mortgagee. In other words, the mortgagee had nothing to do with the contract; he was merely to get the fruits of the contract, if there were any.

Now, every one of these policies is hedged about with many conditions. There is a residence property that is insured, and one of the conditions is that every policy should be avoided, that is, become no contract at all, if the insured premises became vacant. Now, you can all appreciate that that might be a very great hardship to the mortgagee to whom the loss would be made payable. He might not know anything about the premises being vacant.

If it was a manufacturing plant that was insured, the condition might be that the owner maintain a watchman on the premises. Now, the mortgagee would not know if a [fol. 162] watchman was there, and because of that, or for something which he did not know about, which in the ordinary course of things he would not know, the policy would be avoided. This was recognized as approaching an injustice to him, and therefore a change was made in its form, and there came to be inserted in the policy a mortgagee clause, or, as it is sometimes called, a union mortgage

clause, in which the insurance company agreed to pay any loss under that policy, so far as the interest of the mortgagee went, regardless of whether it had been avoided by the owner through failure to meet the conditions.

Now, although this case is being tried in a court of the United States, it is being tried under the state law, and the courts of Pennsylvania have said that when you have that kind of a contract you have two contracts. There is the contract of insurance with the owner of the property subject to all the conditions of the policy, and in the policy there is this second contract between the mortgagee and the insurance company. Now, do you get that picture? Therefore, the courts of Pennsylvania permitted the mortgagee, in his own name, to sue on that second contract if there was a loss under the policy.

Now, I want to direct your attention to the fact that this suit by the mortgagee is not a suit by the owner of the property, but it is a suit by the mortgagee against the insurance company under what I call the second contract.

The policy contains this clause, reading: "It is understood that the buildings insured hereunder are now under foreclosure proceedings by the Corn Exchange National Bank and Trust Company. The premium being paid by the Corn Exchange National Bank and Trust Company, it is agreed that in the event of loss same will be adjusted [fol. 163] with the Corn Exchange National Bank and Trust Company, and paid to them and John M. Kennedy, 3rd, mortgagee, as interest may appear."

You see, you have a contract between the insurance companies and the mortgagee, and you see that the parties interested in that contract, and entitled to payments for the loss, were both the Corn Exchange National Bank and Trust Company and John M. Kennedy, 3rd, both of whom were mortgagees. Just keep that in mind.

This suit, as I have said, is by John M. Kennedy, 3rd, the mortgagee. What is the difference? The difference is very simple, very clear-cut, and easily understood. I mean by that that that is not difficult for anybody to grasp.

The insurance companies are here before you saying that we made that contract, yes, we are perfectly willing to live up to it, that is the business we are engaged in, and if there is a loss under the policy we stand ready to pay the loss in accordance with the contract, but that contract was can-

celled, annulled, and declared void by the parties here, and we returned to them the unearned premiums, that is part of the premiums that apply to the future; we returned to them that money and these policies were, what we call cancelled.

Now, nobody need be told that if that is true the situation would be precisely the same as if no contract had been made.

You will see that under the contract any of the parties, either the insured or the insurer had the right to declare this policy at an end on certain terms, one of which was the return of the so-called unearned premiums.

It goes without saying that if you have a contract between two parties, they may, at any time, if they choose, [fol. 164] agree that that contract be at an end, and that it should be wiped out. Anybody will concede that right, but it would require the participation of everybody to the contract.

A man makes a contract with somebody else, and that somebody else, the other contracting party, agrees to declare that contract void. Your common sense will tell you that he could not annul that contract so as to affect your rights. You had a right in that contract, and that contract could not be voided, set aside, or annulled unless you agreed to it. Do you get the point? You see, the whole question in this case comes down to the simple question of whether John M. Kennedy, 3rd, agreed to the annulment of the policy. If he did, that is the end of the case. Of course, if not, the other consequence follows.

When I said that the case comes down to a simple and single question you can appreciate what I mean. This case turns on your answer as to whether under all the evidence in this case John M. Kennedy, 3rd, was a party to the act of the Corn Exchange National Bank and Trust Company in asking that this policy be cancelled. If he was, anybody's common sense will tell him that he had no further right in the policy. If he did not, then the policy remains in full force and effect.

Now bring your mind to answer that simple question of fact. Get the whole situation in your mind. Here was a property that a few years ago—that is agreed by every one—was of substantial value, because loans were made on it. John M. Kennedy, 3rd, made a loan on it in the sub-

stantial sum of $25,000, and the Union Bank, or some other institution, made a loan—I don't know whether the sum of that loan was made known to you or not—but evidently it was likewise for a substantial sum.

[fol. 165] All of these people have become involved in the condition that we are more or less familiar with. We all hope that it is now in the past tense. Maybe we are still passing through it.

Due to that situation there has been what we call a slump, a very grave slump, in the value of real estate. It affected this property, and you see the effect it had on these mortgagees, not only the Corn Exchange National Bank and Trust Company, which had been appointed conservator, caretaker, for the mortgage of the Union Bank, but also Mr. Kennedy. The Corn Exchange National Bank and Trust Company took over the management of that loan, virtually in the position of receiver for the company whose duty it was to look out and care for that investment and save out of it what they could. That, of course, was their duty as conservator, and there is ample evidence in this case to justify you in finding that they attempted to meet that full responsibility.

A default had been made by the owner of the property. It may be that the national prohibition law had something to do with the falling off of its business. I do not know what the business of the owner was. In any event, the owner of the property defaulted, and Kennedy, who held the first mortgage, was called upon to protect his interest by foreclosing that mortgage. Had he done so, and had the foreclosure sale been made, the practical effect of that would have been to wipe out the second mortgage, which the Corn Exchange National Bank and Trust Company had charge of. They would have been compelled to take whatever proceeds the sheriff's sale produced after Kennedy's claim had been paid in full.

He was asked to withhold foreclosure of his mortgage, [fol. 166] and was told that the Corn Exchange National Bank and Trust Company would foreclose their mortgage. Of course, there was implied in that the expectation that he would be paid in full. He acquiesced in that on certain conditions. One of these was that the Corn Exchange National Bank and Trust Company would protect both mortgages with insurance.

There was insurance on the property. For some reason, whether it was because the insurance company had given notice, I do not know what the reason was, but it was decided that the existing policy on the property should be cancelled.

Now, as you know, when a policy of insurance is cancelled, there is what is known as unearned premium which is returned to the party entitled to it. As these policies were made the unearned premium would be paid to the mortgagee, and in this case, would be paid to Mr. Kennedy, something like $95, and a check was sent to Mr. Kennedy, as the man to whom it belonged. But, having in mind that the Corn Exchange National Bank and Trust Company was taking out other insurance which would protect him, he evidently had some doubt in his mind that he had a right to that money, and he thought that it ought to be turned over to the Corn Exchange National Bank and Trust Company, and he did turn it over to them, and that money was, of course, directly or indirectly used in paying the four hundred odd dollars insurance premium on the second batch of policies, which are the policies here in suit.

That is the situation as it then stood, and this contract was made in the form in which I have recited, that the Corn Exchange National Bank and Trust Company should pay the premium on that contract of insurance, and that it [fol. 167] should be held for the benefit of the Corn Exchange National Bank and Trust Company, and John M. Kennedy, 3rd, mortgagee, as their interest may appear. This is the situation as it then existed.

Afterwards, this other situation to which I have called your attention became acute, and the conservator, the Corn Exchange National Bank and Trust Company, holder of the second mortgage, evidently decided that there was nothing in that property for them, that the security was, in practical effect, nothing, that the property was not worth saving; that after the first mortgage there would be nothing for them, and they said, we will save out of this wreck all we can. What we can save is cancelling these insurance policies which we no longer need. In effect, they said that in view of the value of the property, we will cancel these insurance policies and save out of the wreck the unearned premium, or as much as we can.

Now, having made that arrangement with Mr. Kennedy, he being a party to this contract of insurance, it was only

fair that they should direct Mr. Kennedy's attention to the fact that they were going to cancel those policies, that they were satisfied that there was no value in the property to satisfy their mortgage, and that we are willing to let everything go and put no more money into it, and get back from the insurance company the unearned premium and take our loss.

They put the matter up to Mr. Kennedy, saying, we want to give you an opportunity to continue the insurance if you desire, and if you will pay us the unearned premium which would be coming to us on the cancellation of these policies, we will turn the whole benefit of the insurance over to you.

Realizing that there was nothing of value in the mort- [fol. 168] gaged premises, Mr. Kennedy, 3rd, said that he would not put any more money in that proposition. It is alleged that he said, "I won't put a dollar more in that property, and you can do as you please."

Now, did that mean that you can cancel the policies, and that I, as a party, agree and consent to the cancellation? Is that what he meant by it? Was it tantamount to saying that you can cancel these policies, you may receive the unearned premium, I am done with it, and have no further interest in that policy? Is that what he meant? Is what he said tantamount to that? If it was, he consented to the cancellation of those policies by becoming a party to it and agreeing to it, and I charge you that your verdict must be for the defense, but if he did not, then those policies remained in force, and I charge you, as a matter of law, that he had an interest in those policies, and I charge you that the plaintiff in this case may recover.

So, you see that the whole question in this case is just what Kennedy did. It is, of course, true that any one who advances a proposition here has what is called the burden of proof, which means that they must introduce evidence from which you are able to find the facts to be as they stated. You direct your attention to that feature of the case, and as you answer that question, so will your verdict be.

Now, just a formality. You are not trying one case. You are trying three cases. The parties have agreed that inasmuch as the facts and testimony in each case will be precisely the same, you are to determine them as if it was one case.

This case involves a fire loss, and ordinarily one of the things you have to determine is the extent of the loss the insured sustained by reason of the fire. It might be a partial loss or it might be a total loss, and you would be called upon to determine what it was.

[fol. 169] Now, the parties here have very sensibly agreed to relieve you of that burden, because they have agreed that the loss is $11,000. That is the amount of money that is involved in this case, and the parties have likewise agreed upon what proportion is to be paid by each defendant in the event that you find a verdict for the plaintiff.

If you find a verdict in favor of the defendants, that means you are answering the question of whether the policy was cancelled, yes it was cancelled; that is, the cancellation was acquiesced in by Mr. Kennedy.

If you find that Mr. Kennedy did not agree to the cancellation of the policy, did not join in the request that they be cancelled, then your verdict should be in favor of the plaintiff, setting the damage at the figure which will be given to you. I think I have made this perfectly clear.

Now, I want to add this fact that this suit is brought in the name of John M. Kennedy, 3rd, but it is brought by him for the benefit of Mrs. Bogash, and that means that she is to receive or get the benefit of whatever money is agreed to by your verdict. You are really to determine the right that Mr. Kennedy gave by this assignment, whether it is much, little, or nothing.

Of course, you will have in mind that when this conversation took place it was before the fire, and it happens that the transfer was made almost simultaneously with the fire, to Mrs. Bogash, of whatever right he had against the insurance company for this loss. Again, I repeat, whether it was much, little, or nothing. Now, I think that makes the case perfectly clear.

Gentlemen, let me ask you a question. For your convenience, it is now half past twelve. If I formally submit the case to you, you will have to stay together until you have [fol. 170] agreed upon your verdict. That would mean that you would not be at liberty to get your lunch. Now, if you prefer to have this case submitted to you now, I will so submit it, but if you prefer to take it after lunch, that would also be agreeable.

There is nothing more to be said. Confer among yourselves as to when you desire to have the case formally submitted to you, and let me know which you prefer.

Jury Foreman (after consulting jury): We prefer to take the case now.

The Court: Are there any specific points on which counsel desires me to instruct the jury?

Mr. Shapiro: May I ask your Honor, in view of the statement of that portion of your Honor's charge in which you said that the Corn Exchange National Bank and Trust Company having determined that it wanted to save what it could out of the wreck of the property, so decided to cancel the policies and get the unearned premium, to charge that they would not have any right to do so unless they got the consent of Mr. Kennedy?

The Court: I think I made that perfectly clear. The Corn Exchange National Bank and Trust Company could not give up Mr. Kennedy's rights unless he acquiesced in the cancellation.

Mr. Shapiro: Now, I ask your Honor to charge the jury that Mr. Kennedy did not consent to the cancellation of the policies.

The Court: Members of the July: I have told you that there is one question of fact for you to determine. Did Kennedy, before the loss, agree, acquiesce, consent, and [fol. 171] join in the request that the policies be cancelled? He and the Corn Exchange National Bank and Trust Company could, of course, surrender all interest in those policies, for they were the only parties to them, but the Corn Exchange National Bank and Trust Company could no more surrender the rights of Kennedy than Kennedy could surrender the rights of the Corn Exchange National Bank and Trust Company.

Mr. Shapiro: Will your Honor give me a general exception to the charge?

The Court: I would give it to you if it is of any use. I call your attention to the fact that the Circuit Court disregards general exceptions.

Mr. Shapiro: I want to take exception to that portion of your charge stating that what he did was tantamount to cancellation.

The Court: Members of the Jury: I usually say, and I think I said it; but to make sure, I say it now. I have analyzed the facts in this case for you. I have said to you

that the case resolves itself into an answer to one single question; it is your duty to answer that question. I have given you no intimation as to how I would answer it. It is likewise your problem to apply an analysis of the facts in the case in answering that question, and, which you think are the controlling facts in the case. Now, that is just as much your problem as the other, when I said to you that there was only one question of fact. Now, if your judgment is in accordance with that policy you may accept it, but if your judgment is not in accord with that judgment you may analyze the case in your own way as to all questions of fact. [fol. 172] Mr. Schell: I think there is one question on which the jury should be charged, and that is on the rights of the Glenwood Distilling Company.

The Court: I think I made that perfectly clear. The Glenwood Distilling Company has nothing whatever to do with the case. I have already pointed out to the jury that this policy is not a policy insuring the owner, but is a contract between the insurance company and the mortgagees and the jury, I think, has that perfectly clear in their minds.

Mr. Shapiro: May I ask that your Honor charge the jury that the three defendants are only representing a certain portion of the loss?

The Court: The jury has the figures.

Mr. Shapiro: The jury might become confused——

The Court: You understand that there was more loss in that fire than is concerned in this case.

Mr. Ambler: May I have an exception to that part of your Honor's charge that Kennedy was insured with the Corn Exchange National Bank and Trust Company?

The Court: Certainly.

I think I have covered all the points addressed to me; insofar as affirmed in the general charge, they are affirmed, and insofar as not so affirmed, they are disaffirmed, and an exception is allowed accordingly.

Points Submitted by Plaintiff

The points submitted by the plaintiff are as follows:

1. I charge you, as a matter of law, that the mortgagee (John M. Kennedy, 3rd), under the terms of the three [fol. 173] policies involved in this case, was entitled to

notice of cancellation as provided in those policies or contracts of insurance.

2. I charge you further that there is no evidence in this case that the defendant insurance companies, or any of them, gave notice to the mortgagee (John M. Kennedy, 3d) of their intention to cancel the said contracts of insurance, or any of them.

3. I charge you that there is no evidence that any one authorized to act in behalf of the defendant companies, or any of them, gave notice to the mortgagee (John M. Kennedy, 3d) of an intention to cancel the contracts of insurance, or any of them, which are made the subject matter of this case.

4. I charge you that there is no evidence that the mortgagee (John M. Kennedy 3rd) received any notice of an intention on the part of the defendant companies, or any of them, to cancel the said contracts of insurance or any of them.

5. I charge you further that none of the defendant companies notified the owner named in the policy, or the mortgagee (John M. Kennedy, 3d), of its intention to cancel the policies, or of the fact that the policies had been cancelled.

6. I charge you that there is no evidence that the mortgagee (John M. Kennedy 3d) requested the defendant companies, or any of them, to cancel the contracts of insurance involved in this case.

7. I charge you that there is no evidence that the mortgagee (John M. Kennedy, 3d) requested any authorized agent or representative of the defendant companies, or any [fol. 174] of them, to cancel the contracts of insurance involved in this case.

8. I charge you that there is no evidence that the mortgagee (John M. Kennedy, 3d) expressly consented to the cancellation by the companies, or any them, of the contracts of insurance involved in this case.

9. I charge you that there is no evidence from which you can imply that the mortgagee (John M. Kennedy, 3d) consented to the cancellation of the contracts of insurance involved in this case by the defendant companies, or any of them.

10. I charge you that there is no evidence that any consent on the part of the mortgagee (John M. Kennedy, 3d), express or implied, to the cancellation of the contracts of insurance, or any of them, made the subject matter of this suit, was even communicated to the defendant companies or any of them.

11. I charge you that there is no evidence that any consent on the part of the mortgagee (John M. Kennedy, 3d), express or implied to the cancellation of the contracts of insurance, or any of them, made the subject matter of this suit, was ever communicated to any authorized agent of the defendant companies or any of them.

12. I charge you, as a matter of law, that neither Mr. Winnet nor Mr. Sweeney was the agent for the mortgagee (John M. Kennedy, 3d), or authorized to act for him in the matter of cancellation of the contracts of insurance, or any of them.

13. I charge you that under all the evidence your verdict must be for the plaintiff.

[fol. 175] 14. I charge you that under the evidence and the pleadings, your verdict must be for the plaintiff.

15. I charge you that under the evidence, your verdict must be for the plaintiff in the sum of $11,000, with interest from March 25, 1932.

(Signed) Harry Shapiro, Attorney for Plaintiff.

POINTS SUBMITTED BY DEFENDANTS

The points submitted by the defendants are as follows:

1. Fire policies may be cancelled by mutual agreement of the parties thereto, and the consent of a third person to whom the loss is payable is not essential to such cancellation.

2. The policies in question insured the interest of the Corn Exchange National Bank and Trust Company, second mortgagee of the premises of the Glenwood Industrial Distilling Company with the loss payable to it and John M. Kennedy, 3rd, first mortgagee of the central part of the premises of the Glenwood Industrial Distilling Company, as their interest might appear and John M. Kennedy, 3rd

had no insurable interest in the insured interest of the Corn Exchange National Bank and Trust Company.

3. The contracting parties to these policies were the Corn Exchange National Bank and Trust Company and the defendant Insurance Companies. These Insurance Companies had no contractual relationship with John M. Kennedy, 3rd as respects cancellation of these policies by agreement between these Companies and the Corn Exchange [fol. 176] National Bank and Trust Company, and if the jury find that the contracting parties cancelled these policies in strict compliance with the provisions provided for therein for such action, the plaintiffs are not entitled to recover for any fire loss sustained subsequently to such cancellation and the verdicts must be for the defendants.

4. If the jury find from the evidence that the Corn Exchange National Bank and Trust Company, the second mortgagee of the insured premises, had no contractual relation under the policies sued upon with either the owner of the premises, the Glenwood Industrial Distilling Company, or John M. Kennedy, 3rd, the first mortgagee, and that the policies sued upon were cancelled by the mutual agreement of the defendant insurers and the Corn Exchange National Bank and Trust Company, the verdicts must be for the defendants.

5. A mortgagee of insured premises, insured under a Standard Mortgagee Clause, attached to a policy procured by a second mortgagee insuring the interests of both as they may appear, is bound by the terms and conditions of the insurance policy except to the extent that these terms and conditions are modified or changed by the terms and conditions set forth in the mortgagee clause.

6. If the jury find that these policies were cancelled by the assured, the Corn Exchange National Bank and Trust Company, under the terms thereof, prior to the loss, such cancellation carried with it any rights John M. Kennedy, 3rd, the first mortgagee, had thereunder, even though he did not receive notice of such cancellation.

7. The Use Plaintiff, as assignee of John M. Kennedy, [fol. 177] 3rd, the first mortgagee, has no other or further rights than John M. Kennedy, 3rd, himself, would have, if he were suing in his own right.

8. If the jury find from the evidence that more than prior to the loss the Corn Exchange National Bank and Trust Company notified John M. Kennedy, 3rd, that it was cancelling the policies sued upon, and suggested that he protect himself by procuring other insurance, and he replied that he did not intend to spend any more money on the property, he thereby not only received notice of the cancellation of the policies but consented to it, and his assignees cannot recover in these suits.

9. If the jury find from the evidence that the policies sued upon were surrendered by the Corn Exchange National Bank and Trust Company to the defendants or or about February 27th, 1932, for cancellation, with the knowledge and acquiescence of John M. Kennedy, 3rd, the first mortgagee, the verdicts must be for the defendants.

10. If the jury find from the evidence that John M. Kennedy, 3rd, assigned to the plaintiff after the fire the mortgage held by him and "any existing insurance or claim for same" in consideration of only $1000, the jury may infer that at the time of the assignment, John M. Kennedy, 3rd was well aware that the policies sued on, aggregating $17,500, had been cancelled and were no longer in force.

11. If the jury find from the evidence that the policies sued on were surrendered and cancelled with the knowledge and acquiescence of John M. Kennedy, 3rd, he and his assignee are estopped from claiming for any fire loss occurring under the policies.

[fol. 178] 12. Under the pleadings and evidence, the verdicts must be for the defendants.

(Signed) Harry S. Ambler, Jr., Attorney for Defendants.

STIPULATION

It was agreed and stipulated by and between counsel for the respective parties that if the Court should not be in session when the jury returns with their verdict, the Clerk of the Court may take the verdict with the same force and effect as if it were taken in open court; and that if the jury should return for further instructions, the Court may give the jury further instructions in the absence of counsel, with

the allowance of an exception to each side to what is said; and that if there are any exhibits or papers which the jury desire to have sent out to them, they may be sent out.

(The jury returned a verdict in favor of the defendant.)

In United States District Court

Order Sealing Bill of Exceptions

And Thereupon, the counsel for the said plaintiff did then and there except to the refusal of the Trial Judge to the aforesaid point for charge presented by plaintiff and the charge and opinion of the said Court, and the said jury rendered their verdict in favor of the defendants and against the plaintiff, and afterwards, to wit, on the 20th day of April, A. D. 1934, the plaintiff moved the said Court for a new trial (prout Motion), and afterwards, to wit, on the 11th day of February, A. D. 1935, the said Court, by the said Honorable Oliver B. Dickinson, Judge, did file an opinion and directed judgment to be entered in favor of the defendants and against the plaintiff on the verdict of [fol. 179] the said jury and the whole record, (prout opinion and ju-gment order) and afterwards, to wit, on the 1st day of March, A. D. 1935, the plaintiff, by its counsel, requested and was granted an Exception to the action of the Court in directing judgment to be entered upon the verdict of the jury and upon the whole record, and inasmuch as the said rulings, charge and opinion so excepted to do not appear on the record:

The said counsel for the said plaintiff did then and there tender this Bill of Exceptions to the rulings, charge, opinion and action of the said Court, and requested the seal of the Judge aforesaid should be put to the same, according to the form of the statute in such case made and provided.

And, Thereupon, the aforesaid Judge at the request of said counsel for the plaintiff, did put his seal to this Bill of Exceptions, pursuant to the aforesaid statute in such case made and provided, this 1st day of March, A. D. 1935.

(Signed) O. B. Dickinson.

Approved as to form.

(Signed) Harry S. Ambler, Attorney for Ætna Insurance Co., Springfield Fire & Marine Ins. Co.
(Signed) Horace Michener Schell, Atty. for Liverpool & London & Globe Ins. Co. Ltd.

[fol. 180] IN UNITED STATES DISTRICT COURT

Argued February 8th, 1935

OPINION, SUR MOTION ~~FOR~~ NEW TRIAL—Filed February 11, 1935

DICKINSON, J.:

This case presented unusual features. Brewery premises were insured. They were subject to two mortgages. One a first mortgage for $25,000.00 and a second mortgage held by a Bank for a substantial sum. The Bank wished to foreclose its mortgage and to be protected by insurance. The policies in suit were arranged for loss if any payable to the mortgagees as interest might appear. The Bank paid the premiums. Later it decided to abandon its investment. Something could be salvaged through the return premiums on a cancellation of the policies. The Bank acquainted the first mortgagee with the situation offering him the policies he paying the Bank the return premium value. The first mortgagee had in the meantime become very much dissatisfied with his investment. He declined the proffer of the Bank saying that he would not pay a dollar more to save his investment but the Bank might do whatever it wished. The Bank alone thereupon gave up the policies for cancellation, the insurers paying the return premium. As the Bank had paid the premium the first mortgagee thought he had no right to the part returned and refused it. He evidently had lost all faith in his $25,000.00 dollar investment because he sold his mortgage for what (off the record) [fol. 181] is said to have been $1000.00. He apparently had not been definitely advised whether the insurance policies had been cancelled but was more than doubtful whether there was any insurance. He however assigned whatever interest he had in any insurance of the mortgaged premises. It happened that the premises were destroyed by fire almost immediately after he had assigned his mortgage and his right if any to the insurance. The insurance Companies refused to pay the loss, asserting the policies to have been cancelled. The present suit was brought in the name of the first mortgagee as legal plaintiff to the use of the assignee. The sole issue was whether the first mortgagee was in effect a party to the cancellation. The jury found for the defendants. What is really the only complaint now made

is that the verdict does not reflect the judgment of the jury of the weight of the evidence upon the question of cancellation but is accounted for by the jury being led to believe that the use plaintiff's investment was a gamble. This it is charged was accomplished by the familiar device of asking a series of questions which implied the existence of a fact. Although no answers are made, the questions serve the purpose. The legal plaintiff was a witness. It may be stated as a circumstance that he evidently tried to be absolutely impartial in his testimony. He was the legal plaintiff. On cross-examination he was asked a series of questions which it is charged were intended to bring out the fact that the use plaintiff was merely gambling on the verdict. One of them was, had the witness any personal interest in the cause? The trial Judge had sustained the use plaintiff in his objections that who received the insurance moneys was an irrelevant inquiry. When however the question of interest was raised, the trial Judge suggested that this might go to [fol. 182] credibiilty, and if so, could not be excluded. The experienced and capable counsel for the plaintiff acquiesced in this and the question was allowed. It is at least doubtful whether the question of credibility was anything more than colorable. The witness was the plaintiff. He was under cross-examination. To have him say he had no interest in the outcome of the trial did not go to credibility in the real sense of discrediting his testimony. Its whole effect was directed to another phase of the case. Obviously that the insurance was the find of the use plaintiff, for which she had paid nothing, had no bearing on the issue to be determined by the jury. The legal plaintiff had no selfish interest in the outcome of the trial because he had assigned all his interest to the use plaintiff. For what he assigned it or what he thought of the value of what he had assigned, was unimportant. Cross-examining counsel has the undoubted right to discredit a witness. Whether under the guise of so doing he may ask a question, the answer to which does not discredit him but has a wholly different purpose, is at least doubtful. We are here however considering the question of entering or refusing to enter judgment on a verdict. A question was submitted to the jury to be determined by the weight of the evidence. Unless there was trial error the verdict should be given effect. Whether the trial Judge was right or wrong on the credibility question and whether counsel in acquiescing was right

or wrong, is not now the question. There was in it no trial error in the legal sense. Of course if it were definitely known that the jury were misled into rendering a wrong verdict by what should not have been admitted, a different situation would have been presented. There was evidence to support the verdict, and we cannot speculate whether the verdict reflects something else than the evidence when there were no trial errors.

[fol. 183] The Rule for a new trial is discharged, and the defendants have leave to enter judgments on the verdict.

In United States District Court

Præcipe to Enter Judgment (re Ætna Insurance Company)—Filed February 13, 1935

To Clerk of said Court:

Kindly enter judgment on the above entitled cause of action.

(S.) Harry S. Ambler, Jr., Attorney for Defendant.

In United States District Court

Judgment, No. 17092—Filed February 14, 1935

Before Dickinson, J.

And Now, February 14th, 1935, in accordance with the verdict and by præcipe filed, Judgment is hereby entered in favor of defendant, Ætna Insurance Company, and against the Plaintiff, John M. Kennedy, 3rd to use of Anna L. Bogash.

By the Court. Attest:

(E.) E. G. Johnson, Deputy Clerk.

[fol. 184] In United States District Court

Præcipe to Enter Judgment (re Springfield Fire & Marine Ins. Co.)—Filed February 14, 1935

To Clerk of said Court:

Kindly enter judgment on the above entitled cause of action.

(S.) Harry S. Ambler, Attorney for Defendant.

IN UNITED STATES DISTRICT COURT

JUDGMENT, No. 17094

Before DICKINSON, J.

And Now, February 14, 1935, in accordance with the verdict and by præcipe filed, Judgment is hereby entered in favor of Springfield Fire & Marine Insurance Company, defendant, and against John M. Kennedy, 3rd, to use of Anna L. Bogash, Plaintiff.

By the Court. Attest:

(E.) E. G. Johnson, Deputy Clerk.

IN UNITED STATES DISTRICT COURT

PRÆCIPE TO ENTER JUDGMENT (RE: LIVERPOOL & LONDON & GLOBE INS. CO. LTD.)—Filed April 4, 1935

To the Clerk of the said Court:

Kindly enter judgment on the above entitled cause of action in favor of defendant.

(S.) Harry Shapiro, Attorney for Plff.

[fol. 185] IN UNITED STATES DISTRICT COURT

JUDGMENT, No. 17098—Filed April 4, 1935

Before DICKINSON, J.

And Now, April 4, 1935, in accordance with the verdict Judgment is hereby entered in favor of defendant, Liverpool & London Globe Insurance Co., Ltd., and against the Plaintiff, John M. Kennedy, 3rd to the use of Anna L. Bogash.

By the Court. Attest:

(S.) Gilbert W. Ludwig, Deputy Clerk.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed April 10, 1935

To the Honorable Oliver B. Dickinson, District Judge:

Anna L. Bogash, the use plaintiff above named, feeling aggrieved by the judgments rendered and entered in the

above entitled causes on February 14, 1935, and on April 4, 1935, does hereby appeal from said judgments to the United States Circuit Court of Appeals for the Third Circuit, for the reasons set forth in the Assignments of Error filed herewith, and prays that the appeal be allowed and that citation be issued as provided by law, and that a transcript of the records, proceedings and documents upon which said judgments were based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Third Circuit under the rules of such Court in such case made and provided.

And your petitioner further prays that the proper order [fol. 186] relating to the security to be required of it to perfect its appeal, be made.

Dated at Philadelphia, Pennsylvania, April 4th, 1935.

Anna L. Bogash, by (S.) Harry Shapiro, Attorney for Use Plaintiff.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed April 10, 1935

Before DICKINSON, J.

Upon petition of Anna L. Bogash, the use plaintiff herein, and the assignments of error filed on her behalf, it is hereby ordered that an appeal to the United States Circuit Court of Appeals for the Third Circuit from the judgments heretofore filed and entered in these causes on the 14th day of February, 1935, and on April 4, 1935, be and the same is hereby allowed, and that a certified transcript of the record in accordance with the rules of practice of the Courts of the United States be transferred to the said United States Circuit Court of Appeals for the Third Circuit.

It is further ordered that the bond on appeal be fixed in the sum of $250.00.

Dated at Philadelphia, Pennsylvania, April 4th, 1935.

By the Court:

(S.) Dickinson, J.

[fol. 187] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed April 10, 1935

Comes now Anna L. Bogash, the use plaintiff above named, the appellant herein, by her attorney of record, and assigns as errors upon which she will rely the following errors as having intervened in the record, proceedings and judgments of the United States District Court, for the Eastern District of Pennsylvania, in the above entitled causes, to wit:

1. The verdict was against the evidence.

2. The verdict was against the law.

3. The verdict was against the weight of the evidence.

4. The verdict was against the charge of the Court.

5. The learned Lower Court erred in overruling plaintiff's motion for a new trial.

6. The learned Lower Court erred in entering judgment on the verdict.

7. The learned Trial Judge erred in sustaining defendants' objection to the following offer of evidence (Record p. 54):

"I offer in evidence so much of paragraph 9 of the Statements of Claim that alleges that the property was totally destroyed, on the ground of the insufficiency of the denial as to the extent of the destruction averred.

Mr. Ambler: Objected to.

The Court: Paragraph 9 of the Statements of Claim and the correspondingly numbered paragraphs in the Affidavit [fol. 188] of Defense establish as a fact in the case not that the premises described in the policy of insurance were destroyed by fire, but that the property of the Glenwood Industrial Distilling Company was damaged by fire.

(Exception noted for plaintiff by direction of the Court.)"

8. The learned Trial Judge erred in overruling plaintiff's objections to the questions and answers concerning the fact that the legal plaintiff had no interest in the suit

and in admitting the said answers as follows (Record pp. 106-107):

"By Mr. Ambler:

Q. You are John M. Kennedy, 3rd, and you are the person that is named as the lien plaintiff in this suit, are you not?

A. I am John M. Kennedy, 3rd; the only one I know of. I am assuming I am the person.

Q. What I am getting at, you have no interest in this suit?

Mr. Shapiro: That is objected to as immaterial. It speaks for itself. That is immaterial.

Mr. Ambler: Oh, no; he is the legal plaintiff.

The Court: I can't exclude evidence as to the interest of any witness that bears upon his credibility. I do not mean by that his truthfulness, but what he knows about the facts to which he has testified. If he has a personal interest, he has one reason for acquainting himself with all the details. If he has no personal interest, his attention to it might be more or less casual.

Mr. Shapiro: On the question of credibility, I have no objection.

The Witness: Yes; I am John M. Kennedy, I believe.

By Mr. Ambler:

Q. And you have no interest in these suits?

A. None whatever.

Q. And you do not have any claims against these defendant companies?

[fol. 189] Mr. Shapiro: That is objected to.

A. None whatever.

Mr. Ambler: I want to ask him now whether he ever had any claim against these defendant companies.

Mr. Shapiro: I object to that, if the Court pleases.

Mr. Ambler: If the Court pleases, these suits are based on——

The Court: Now, these suits—all right. I will permit you to show that he has no interest whatever in these suits, but what his other relations with the company were. I do not see that we have anything to do with them."

9. The learned Trial Judge erred in overruling plaintiff's objection to the following question (Record p. 108):

"Q. Now, when you signed that assignment on the 26th day of March, 1932, is it not a fact that prior thereto you had notice of the cancellation of these policies, upon which this suit is founded?

Mr. Shapiro: Objected to.

(Objection overruled. Exception noted for plaintiff by direction of the Court.)"

10. The learned Trial Judge erred in overruling plaintiff's objection to the question and her motion to strike out the answer as follows (Record pp. 108-110):

"Q. Didn't you have notice of the fact before this fire that these policies had been surrendered for cancellation?

Mr. Shapiro: Just a minute. I object to that.

The Court: The question is whether or not he knew that these policies, that have been shown to him, had been surrendered to the respective companies for cancellation.

Mr. Shapiro: May I say to the Court that it doesn't make any difference if they were surrendered three times, if they [fol. 190] were not surrendered by a proper method. The contract in this case is a contract that speaks for itself on the question of cancellation. There is only one way in which this contract can be cancelled with respect to the mortgagee, and that is specified in the policy how it must be cancelled. Therefore, I ask your Honor to say that that question is immaterial. The question can only be; was it cancelled?

The Court: No; this is cross-examination, and cross-examining counsel is never required to disclose the theory of the cross-examination. The question, as I understand it, was whether before and at the time he made this assignment he has referred to—whether or not at that time he knew that the policies that have been shown him, those policies had been surrendered to the insurance companies for the purpose of cancellation.

(Objection overruled. Exception noted for plaintiff by direction of the Court.)

The Witness: At the time of the assignment, to the best of my recollection and knowledge, I had never been shown

the policies involved. The notice of cancellation—any notice of cancellation that I had of insurance came to me several months before the fire by a telephone call from Mr. Winnet.

Mr. Shapiro: Now I ask that the answer be stricken out as not responsive to the question.

The Court: Oh, I think that is responsive. He has told you, as I understand him, of his knowledge. He was asked whether he knew. He has given us a very clear statement of his knowledge on the subject.

Mr. Shapiro: It will only put me in the position of cross-examining my witness.

The Court: I have permitted him to answer the question.

Mr. Shapiro: Your Honor, I move that the answer be stricken out, especially for the reason that the notice referred to does not disclose whether or not it was a written notice or a verbal notice.

The Court: Oh, yes; he said by telephone.

[fol. 191] Mr. Shapiro: I did not hear it.

(Motion denied. Exception noted for plaintiff by direction of the Court.)"

11. The learned Trial Judge erred in overruling plaintiff's objection to the admission into evidence of defendant's Exhibit "2" as follows (Record p. 125):

"Q. Have you any record there, which shows the amount of the return premium?

A. I have a record here which shows the amount of the return premium. I have a letter from Dennis Sweeny & Company:

'Enclosed find check in amount of $114.19 being return premium under policies No. 22132 Connecticut Fire Ins. Co., 25322 Springfield F. & M. Ins. Co., 22611 Ætna Insurance Co., and L. 331072 Liverpool & London & Globe Ins. Co. covering property of Glenwood Industrial Distilling Company cancelled and surrendered.'

Mr. Schell: I offer in evidence, if your Honor pleases, the letter referred to by the witness, where with the check for the return premium was forwarded to the Corn Exchange National Bank & Trust Company.

Mr. Shapiro: I object to the letter. If this witness will tell me to whom the checks were made payable and what was done with them, I will raise no objection to the fact that the checks were not produced. I do not want to be technical about it. I am perfectly satisfied to acknowledge that I know there was a return premium to these people, but I don't think we should be bound by the letter.

The Court: Well, it is merely a letter accompanying the check, which paid the return premium.

Mr. Shapiro: It does not show to whom the check was payable.

Mr. Schell: I will have the check here in a minute.

[fol. 192] The Court: The implication is that the payee was the party to whom the letter was addressed.

By Mr. Schell:

Q. I show you a check, dated February 27, 1932——

The Court: Wait a minute. There is an objection on the record that has not been disposed of. Let us clear up the record. Is the objection withdrawn or the offer withdrawn?

Mr. Schell: No; I do not withdraw the offer.

Mr. Shapiro: I press the objection.

(Objection overruled. Exception noted for plaintiff.)"

12. The learned Trial Judge erred in overruling plaintiff's objection to the following question (Record p. 146):

"Q. But is it or is it not a fact that you declined to purchase any insurance?

Mr. Shapiro: Objected to.

(Objection overruled. Exception noted for plaintiff by direction of the Court.)

A. It is."

13. The learned Trial Judge erred in sustaining defendants' objection to the following question (Record p. 151-152):

"Q. Isn't it also true that the Corn Exchange didn't put up all of the original premium? Isn't that true?

Mr. Schell: I object.

(Objection sustained. Exception noted for plaintiff by direction of the Court.)''

14. The learned Trial Judge erred in overruling plaintiff's objection to the following question (Record p. 154):

''Q. From whom did you receive the premium?
[fol. 193] A. From the Corn Exchange.

Mr. Shapiro: Wait a minute. That is objected to.

(Objection overruled. Exception noted for plaintiff by direction of the Court.)''

15. The learned Trial Judge erred in overruling plaintiff's objection to the following question (Record p. 154):

''Q. Do you have any knowledge as to whether or not there had been any other contributors to the fund that made up that premium?

Mr. Shapiro: That is objected to.

(Objection overruled. Exception noted for plaintiff by direction of the Court.)

A. Absolutely not.''

16. The learned Trial Judge erred in overruling plaintiff's objection to the following question (Record p. 155):

''Q. Were these policies sent to your office in February of 1932 for cancellation?

Mr. Shapiro: That is objected to as stating a conclusion. What purpose they were sent for is a conclusion, a matter for this jury to decide. I have no objection to his asking whether they were sent to his office.

The Court: The fact may be a conclusion. It is a question as to the fact.

(Objection overruled. Exception noted for plaintiff by direction of the Court.)''

17. The learned Trial Judge erred in declining to charge the jury as requested by plaintiff as follows (Record pp. 172-173):

1. I charge you, as a matter of law, that the mortgagee (John M. Kennedy, 3d), under the terms of the three poli-

cies involved in this case, was entitled to notice of cancellation as provided in those policies or contracts of insurance.

[fol. 194] 18. The learned Trial Judge erred in declining to charge the jury as requested by plaintiff as follows (Record p. 173):

2. I charge you further that there is no evidence in this case that the defendant insurance companies, or any of them, gave notice to the mortgagee (John M. Kennedy, 3d) of their intention to cancel the said contracts of insurance, or any of them.

19. The learned Trial Judge erred in declining to charge the jury as requested by plaintiff as follows (Record p. 173):

3. I charge you that there is no evidence that any one authorized to act on behalf of the defendant companies, or any of them, gave notice to the mortgagee (John M. Kennedy, 3d) of an intention to cancel the contracts of insurance, or any of them, which are made the subject matter of this case.

20. The learned Trial Judge erred in declining to charge the jury as requested by plaintiff as follows (Record p. 173):

4. I charge you that there is no evidence that the mortgagee (John M. Kennedy 3rd) received any notice of an intention on the part of the defendant companies, or any of them, to cancel the said contracts of insurance or any of them.

21. The learned Trial Judge erred in declining to charge the jury as requested by plaintiff as follows (Record p. 173):

5. I charge you further that none of the defendant companies notified the owner named in the policy, or the mort-
[fol. 195] gagee (John M. Kennedy, 3d), of its intention to cancel the policies, or of the fact that the policies had been cancelled.

22. The learned Trial Judge erred in declining to charge the jury as requested by plaintiff as follows (Record p. 173):

6. I charge you that there is no evidence that the mortgagee (John M. Kennedy, 3d) requested the defendant com-

panies, or any of them, to cancel the contracts of insurance involved in this case.

23. The learned Trial Judge erred in declining to charge the jury as requested by plaintiff as follows (Record pp. 173-174):

7. I charge you that there is no evidence that the mortgagee (John M. Kennedy, 3d) requested any authorized agent or representative of the defendant companies, or any of them, to cancel the contracts of insurance involved in this case.

24. The learned Trial Judge erred in declining to charge the jury as requested by plaintiff as follows (Record p. 174):

8. I charge you that there is no evidence that the mortgagee (John M. Kennedy, 3d) expressly consented to the cancellation by the companies, or any of them, of the contracts of insurance involved in this case.

25. The learned Trial Judge erred in declining to charge the jury as requested by plaintiff as follows (Record p. 174):

9. I charge you that there is no evidence from which you can imply that the mortgagee (John M. Kennedy, 3d) con-
[fol. 196] sented to the cancellation of the contracts of insurance involved in this case by the defendant companies, or any of them.

26. The learned Trial Judge erred in declining to charge the jury as requested by plaintiff as follows (Record p. 174):

10. I charge you that there is no evidence that any consent on the part of the mortgagee (John M. Kennedy, 3d), express or implied, to the cancellation of the contracts of insurance, or any of them, made the subject matter of this suit, was even communicated to the defendant companies or any of them.

27. The learned Trial Judge erred in declining to charge the jury as requested by plaintiff as follows (Record p. 174):

11. I charge you that there is no evidence that any consent on the part of the mortgagee (John M. Kennedy, 3d),

express or implied, to the cancellation of the contracts of insurance, or any of them, made the subject matter of this suit, was ever communicated to any authorized agent of the defendant companies or any of them.

28. The learned Trial Judge erred in declining to charge the jury as requested by plaintiff as follows (Record p. 174):

12. I charge you, as a matter of law, that neither Mr. Winnet nor Mr. Sweeney was the agent for the mortgagee (John M. Kennedy, 3d), or authorized to act for him in the matter of cancellation of the contracts of insurance, or any of them.

29. The learned Trial Judge erred in declining to charge the jury as requested by plaintiff as follows (Record p. 174):

[fol. 197] 13. I charge you that under all the evidence your verdict must be for the plaintiff.

30. The learned Trial Judge erred in declining to charge the jury as requested by plaintiff as follows (Record p. 175):

14. I charge you that under the evidence and the pleadings, your verdict must be for the plaintiff.

31. The learned Trial Judge erred in declining to charge the jury as requested by plaintiff as follows (Record p. 175):

15. I charge you that under the evidence, your verdict must be for the plaintiff in the sum of $11,000, with interest from March 25, 1932.

(S.) Harry Shapiro, Attorney for Use Plaintiff.

IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed April 12, 1935

To the Clerk of said Court:

You are hereby requested to make a transcript of the record to be filed in the Circuit Court of Appeals, for the Third

Circuit, pursuant to an appeal filed in the above cases, and to include in such transcript the following:

Docket Entries.
Statements of Claim (3).
Affidavits of Defense (3).
Bill of Exceptions.
Opinion of Hon. Oliver B. Dickinson dismissing motion for new trial.
[fol. 198] Præcipes for Judgment (3).
Judgments (3).
Petition for Appeal.
Order allowing Appeal.
Assignments of Error.
Præcipe for Transcript of Record.
Clerk's Certificate.

(S.) Harry Shapiro, Attorney for Plaintiff.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 199] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 5859. October Term, 1935

No. 5860. October Term, 1935

[fol. 200] No. 5861. October Term, 1935

[Titles omitted]

REFERENCE TO ARGUMENT

And afterwards, to wit, the eleventh day of October, 1935, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable J. Warren Davis and Honorable J. Whitaker Thompson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the sixteenth day of January, 1936, come the parties aforesaid by their counsel afore-

said, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 201] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 5859. October Term, 1935

JOHN M. KENNEDY, 3RD, to the Use of ANNA L. BOGASH, Plaintiff-Appellant,

v.

ÆTNA INSURANCE COMPANY, Defendant-Appellee

No. 5860. October Term, 1935

JOHN M. KENNEDY, 3RD, to the Use of ANNA L. BOGASH, Plaintiff-Appellant,

v.

SPRINGFIELD FIRE & MARINE INSURANCE COMPANY, Defendant-Appellee

No. 5861. October Term, 1935

JOHN M. KENNEDY, 3RD, to the Use of ANNA L. BOGASH, Plaintiff-Appellant,

v.

THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY LIMITED, Defendant-Appellee

Upon Appeals from the District Court of the United States for the Eastern District of Pennsylvania

OPINION—Filed January 16, 1936

[fol. 202] Before Buffington, Davis and Thompson, Circuit Judges

THOMPSON, Circuit Judge:

These are appeals from judgments of the District Court for the Eastern District of Pennsylvania. The three cases were based on fire loss to certain premises covered by fire insurance policies issued by the appellees. By consent, they were tried together. The legal plaintiff, Kennedy, was

owner of a first mortgage on the premises covered by the insurance policies in suit. The Corn Exchange National Bank, hereinafter referred to as Corn Exchange, owner of a second mortgage on the same premises, commenced foreclosure proceedings. It applied for and paid the premiums on the three fire insurance policies in suit. Each policy contained, inter alia, the following three clauses:

"Loss or damage, if any, under this Policy, shall be payable to John M. Kennedy, 3rd, as mortgagee, (or trustee) as interest may appear, and this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property • • •"

"It is understood that the buildings insured hereunder are now under foreclosure proceedings by the Corn Exchange National Bank & Trust Co. The premium being paid by the Corn Exchange National Bank & Trust Co. it is agreed that in event of loss, same will be adjusted with the Corn Exchange National Bank & Trust Co. and paid to them and John M. Kennedy, 3rd, Mortgagee, as interest may appear."

"This Company reserves the right to cancel this Policy at any time as provided by its terms, but in such case this Policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice to the [fol. 203] mortgagee (or trustee) of such cancellation and shall then cease, and this Company shall have the right, on like notice, to cancel this agreement."

After the bid at the sheriff's sale following judgment in the foreclosure suit, Winnet, attorney for the second mortgagee, Corn Exchange, orally advised Kennedy of the intention of Corn Exchange to abandon the property and cancel the policies. Corn Exchange returned the policies to the appellees. Prior to the expiration date of the policies the premises were destroyed by fire. Thereafter Kennedy assigned his interest to Anna L. Bogash, the plaintiff.

The issue is whether the policies were in force at the time of the fire or whether Kennedy had acquiesced in their cancellation. At the trial sufficient emphasis was placed upon the question whether the conversation between Kennedy and Winnet amounted to a consent by Kennedy to a cancellation of the policies. This issue was presented to the jury which, by its verdict, must have decided it in the affirm-

ative. Another equally important question—that of notice—was overlooked. The appellant contends that by reason of the hereinbefore quoted covenant regarding notice, Kennedy was entitled to notice by the appellees of cancellation, that the failure of the insurance companies to notify Kennedy of the cancellation of the policies prevented the cancellations from being effective as to him and that, therefore, as to Kennedy they were in full force and effect at the time of the fire. This court has ruled that a mortgagee clause in a fire insurance policy results in an entirely separate insurance of the mortgagee's interest, which is not affected by acts of the owner. Queen Ins. Co. v. People's Union Sav. Bank, 50 F. (2d) 63. Applying this principle to the instant case, the act of the second mortgagee in tendering the policies for cancellation does not affect the rights of [fol. 204] the first mortgagee to notice of cancellation expressly guaranteed him by the above quoted clause of the insurance policies. We think that the question whether Kennedy's conversation with Winnet amounted to a waiver of his right to notice of cancellation was one of the fact issues which should have been presented to the jury and that the refusal of the trial court to charge on points involving the question of notice amounted to reversible error. The judgments are reversed and new trials ordered.

A true Copy. Teste:

——— ———, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 205] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1935

No. 5859

JOHN M. KENNEDY, 3D, to the Use of ANNA L. BOGASH, Appellant,

v.

ÆTNA INSURANCE CO., Appellee

On Appeal from the District Court of the United States for the Eastern District of Pennsylvania

ORDER REVERSING JUDGMENT, ETC.—Filed January 16, 1936

This cause came on to be heard on the transcript of record from the District Court of the United States, for

the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby reversed, with costs, and a new trial ordered.

Philadelphia, January 16, 1936.

J. W. Thompson, Circuit Judge.

[File endorsement omitted.]

[fol. 206] In United States Circuit Court of Appeals for the Third Circuit, October Term, 1935

No. 5860

John M. Kennedy, 3d, to the Use of Anna L. Bogash, Appellant,

v.

Springfield Fire & Marine Insurance Co., Appellee

On Appeal from the District Court of the United States for the Eastern District of Pennsylvania

Order Reversing Judgment, Etc.—Filed January 16, 1936

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby reversed, with costs, and a new trial ordered.

Philadelphia, January 16, 1936.

J. W. Thompson, Circuit Judge.

[File endorsement omitted.]

[fols. 207-208] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1935

No. 5861

JOHN M. KENNEDY, 3D, to the Use of ANNA L. BOGASH, Appellant,

v.

THE LIVERPOOL AND LONDON AND GLOBE INSURANCE CO., LTD., Appellee

On Appeal from the District Court of the United States for the Eastern District of Pennsylvania

ORDER REVERSING JUDGMENT, ETC.—Filed January 16, 1936

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby reversed, with costs, and a new trial ordered.

Philadelphia, January 16, 1936.

J. W. Thompson, Circuit Judge.

[File endorsement omitted.]

[fols. 209-210] [File endorsement omitted]

[fol. 211] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 5859, No. 5860, No. 5861

[Titles omitted]

PETITION FOR REHEARING—Filed January 29, 1936

To the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit:

The undersigned, Springfield Fire & Marine Insurance [fol. 212] Company, Aetna Insurance Company, and The Liverpool and London and Globe Insurance Company,

Limited, your petitioners, respectfully submit that they have been aggrieved by the opinion of your Honorable Court rendered herein on the 16th day of January, 1936, in the respects hereinafter set forth and prays for a rehearing in said matter.

The opinion of your Honorable Court states that the issue in the captioned cause was whether the policy was in force at the time of the fire or whether Kennedy had acquiesced in the cancellation; that this question was submitted with sufficient emphasis to the jury which by its verdict, must have decided the question in the affirmative. The Court, however, holds that notwithstanding the affirmation of this question, the trial court should have submitted to the jury under proper instructions the question as to whether or not Kennedy waived the right to notice of cancellation as provided by the policy.

That the conclusion of your Honorable Court in this regard, it is respectfully submitted, is erroneous for the following reasons:

(a) The notice referred to becomes effective only when the company seeks to cancel, for the cancellation clause of the policy with respect to a mortgagee reads:

"This Company reserves the right to cancel this Policy at any time as provided by its terms, but in such case this Policy shall continue in force for the benefit only of the mortgagee [fol. 213] (or trustee) for ten days after notice to the mortgagee (or trustee) of such cancellation and shall then cease, and this Company shall have the right, on like notice, to cancel this agreement."

(b) Kennedy as mortgagee is a beneficiary under the contract of insurance and a beneficiary who with full knowledge of the acts of the parties amounting to a consent to the cancellation, acquiesces therein, is estopped from asserting any rights under the policy: Missouri S. L. Insurance Co. v. Hill, 109 Ark. 17, 159 S. W. 31. The jury having found by its verdict that Kennedy either consented to or acquiesced in the cancellation, he is now estopped from asserting any rights under the contract, which would include the right to notice of cancellation, even if that particular portion of the clause with reference to cancellation is applicable to the instant case.

(c) The parties to a contract of insurance acting for themselves or through their agents, have a right to cancel it by mutual consent or agreement:

HiGrade Oil Co. v. U. S. F. & G. Ins. Co., 93 W. Va., 448;
Ins. Co. v. Johnson, 105 Fed. 286;
Westchester Fire Ins. Co. v. McWilliams, 188 S. W. 25;
Hillock v. Ins. Co., 54 Mich. 531;
[fol. 214] Miller v. Ins. Co., 152 Minn. 404;
Scheel v. Ins. Co., 288 Pa. 44;
Insurance Co. of N. A. v. McWilliams, 218 S. W. 80;
Ocean A. & G. Corp. v. Meets, 61 Utah 426.

In the case of Scheel v. Insurance Co., supra, the Court said:

"A policy of fire insurance is a contract of indemnity, and unless it is canceled by mutual consent, or the policy provides that it may be terminated on the option of the parties and is so terminated, it will continue in force for the term for which it was written."

Any contract may be cancelled by mutual consent. The insurance contract is no exception to that general principle. The syllabus in the case of Farmers' Mutual Insurance Co. vs. Wenger, 90 Pa. 220, is as follows:

"The by-laws of a mutual insurance company provided that the liability of a member should continue, until the cancellation of his policy and the erasure of his name from the books of the company. Held, that the company was relieved from liability for a loss by fire after a voluntary surrender of his policy by a holder, without a formal cancellation of the same and the erasure of his name from the books of the company."

[fol. 215] In the case of McRae vs. Mercury Insurance Co., 253 N. W. Reporter 645, the Court said, inter alia:

"(1) 'An agreement for an immediate cancellation without giving five days' notice can be made, and this may be shown by acts and conduct as well as by direct words'. Home Ins. Co. v. Chattahoochee Lumber Co., 126 Ga. 334, 55 S. E. 11, 12. The same principle applies to a life insur-

ance policy. Missouri State Life Ins. Co. v. Hill, 109 Ark. 17, 159 S. W. 31.

"(2) Acquiescence in a cancellation notice will operate to cancel the policy and will work an estoppel to assert that the policy is still in force. Hopkins & Cochran v. Phœnix Ins. Co., 78 Iowa, 344, 43 N. W. 107; Hilock v. Traders' Ins. Co., 54 Mich. 531, 20 N. W. 571; Missouri State Life Ins. Co. v. Hill, 109 Ark. 17, 159 S. W. 31."

In the case of LaFrance Workshop Lampshade Co. v. Buffalo Insurance Co. et al., 318 Pa. 191, in which the appellant raised the same proposition as is raised here: namely, that notwithstanding the fact that the policies had been cancelled by mutual consent or agreement, the assured was still entitled to notice of cancellation as provided in the policy, the Supreme Court said (p. 195):

"In appellant's argument it is suggested that, as the policies contained a provision for cancellation 'at any time by the company, by giving to the insured a five days' written [fol. 216] notice of cancellation • • •' etc., and, as no notice was given by the companies direct to the plaintiff, the policies were nevertheless in force. The contention must be rejected. For the purposes of this insurance, plaintiff and Lare and Company were one; the authority conferred on Lare and Company, so far as the insurance companies are concerned with it, was sufficient to justify the companies (cf. Lauer Brewing Co. v. Schmidt, 24 Pa. Superior Ct. 396, 401) in continuing to deal with the broker by accepting the policies from him for cancellation for want of payment of premiums.

"But, properly considered, the action of the companies was not under the cancellation clause quoted. The parties were competent to cancel their contract by agreement at any time. See Scheel v. German-American Ins. Co., 228 Pa. 44, 76 A. 507; Arnfeld v. Guardian Assurance Co., 172 Pa. 605, 34 A. 580; Farmers Mut. Ins. Co. v. Wenger, 90 Pa. 220. Indeed, there was a provision on the subject. 'This policy shall be cancelled at any time at the request of the insured; in which case the company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time.'"

It will be noted that in the last cited case, the policies were surrendered for cancellation by the agent of the assured. In the instant case Winnet was acting in the same capacity for Kennedy. It will thus be seen that the notice [fol. 217] which a party to a contract of insurance is entitled to receive exists only where the insurer seeks to cancel, the purpose of the notice of course being to afford the insurer an opportunity to replace the insurance in other companies. The instant case does not present a situation where your petitioners endeavored to cancel the policy, but a case where the policy was cancelled by mutual agreement. The verdict of the jury affirmatively establishes the consent and acquiescence of Kennedy thereto.

The authorities set forth herein establish that no notice is necessary where the policy is cancelled by mutual agreement or consent; and by his consent and acquiescence Kennedy not only waived his right to such notice but is likewise estopped from asserting any rights under the contract by reason of that consent and acquiescence.

It is submitted that your Honorable Court entirely overlooked the legal fact that a contract of insurance, like any other contract, may be cancelled by mutual consent and, if so cancelled, the question of notice, which arises only when the insurer seeks to cancel without the acquiescence and consent of the assured, plays no part in the effectuation of a cancellation.

Wherefore and for other reasons appearing in petitioner's brief as filed, petitioners respectfully urge that a rehearing may be granted and that the mandate of this Court [fol. 218] may be stayed pending disposition of this petition.

Respectfully submitted, Springfield Fire & Marine Insurance Company, and Ætna Insurance Company, by Harry S. Ambler, Jr., Attorney. Liverpool & London and Globe Ins. Co., Ltd., by Horace M. Schell, Attorney.

[fols. 219-220] We, Harry S. Ambler, Jr., and Horace M. Schell, of Philadelphia, attorneys legally admitted to practice in the United States Circuit Court of Appeals for the Third Circuit, do certify that in our opinion the foregoing petition for rehearing in the cases of John M. Kennedy, 3rd, to the use of Anna L. Bogash v. Aetna Insurance Company, No. 5859, October Term, 1935; John M. Kennedy, 3rd, to the use of Anna L. Bogash, v. Springfield Fire & Marine Insur-

ance Company, No. 5860, October Term, 1935, and John M. Kennedy, 3rd, to the use of Anna L. Bogash, v. The Liverpool and London and Globe Insurance Company Limited, No. 5861, October Term, 1935, is well founded and is not presented for the purpose of creating a delay.

Dated at Philadelphia this 29th day of January, 1936.

Harry S. Ambler, Jr. Horace M. Schell.

[fol. 221] In United States Circuit Court of Appeals for the Third Circuit

No. 5859, No. 5860, No. 5861

[Titles omitted]

Opinion sur Petition for Rehearing—Filed January 29, 1937

[fol. 222] Before Buffington, Davis and Thompson, Circuit Judges

Davis, Circuit Judge:

These cases are here on petitions for rehearing.

In our former opinion we said:

"Each policy contained, inter alia, the following three clauses:

'Loss or damage, if any, under this Policy, shall be payable to John M. Kennedy, 3rd, as mortgagee, (or trustee) as interest may appear, and this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property • • •.'

'It is understood that the buildings insured hereunder are now under foreclosure proceedings by the Corn Exchange National Bank & Trust Co. The premium being paid by the Corn Exchange National Bank & Trust Co. it is agreed that in event of loss, same will be adjusted with the Corn Exchange National Bank & Trust Co. and paid to them and John M. Kennedy, 3rd, Mortgagee, as interest may appear.'

'This Company reserves the right to cancel this Policy at any time as provided by its terms, but in such case this Policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice to the mortgagee (or trustee) of such cancellation and shall then cease, and this Company shall have the right, on like notice, to cancel this agreement.'

"After the bid at the sheriff's sale following judgment in the foreclosure suit, Winnet, attorney for the second mortgagee, Corn Exchange, orally advised Kennedy of the inten- [fol. 223] tion of Corn Exchange to abandon the property and cancel the policies. Corn Exchange returned the policies to the appellees. Prior to the expiration date of the policies the premises were destroyed by fire. Thereafter Kennedy assigned his interest to Anna L. Bogash, the use plaintiff.

The issue is whether the policies were in force at the time of the fire or whether Kennedy had acquiesced in their cancellation. At the trial sufficient emphasis was placed upon the question whether the conversation between Kennedy and Winnet amounted to a consent by Kennedy to a cancellation of the policies. This issue was presented to the jury which, by its verdict, must have decided it in the affirmative. Another equally important question—that of notice—was overlooked. The appellant contends that by reason of the hereinbefore quoted covenant regarding notice, Kennedy was entitled to notice by the appellees of cancellation, that the failure of the insurance companies to notify Kennedy of the cancellation of the policies prevented the cancellations from being effective as to him and that, therefore, as to Kennedy they were in full force and effect at the time of the fire. This court has ruled that a mortgagee clause in a fire insurance policy results in an entirely separate insurance of the mortgagee's interest, which is not affected by acts of the owner. Queen Ins. Co. v. People's Union Sav. Bank, 50 Fed. (2d) 63. Applying this principle to the instant case, the act of the second mortgagee in tendering the policies for cancellation does not affect the rights of the first mortgagee to notice of cancellation expressly guaranteed him by the above quoted clause of the insurance policies."

The following testimony of Mr. Winnet is substantially all that was said with regard to acquiesence:

"Q. After this property had been sold at Sheriff's sale did you discuss with Mr. Kennedy any question of the surrendering of these policies for cancellation?

[fol. 224] A. Yes; I did. I tried to get him to buy the policies. We determined that there was no equity, and we were not getting the title on the sheriff's sale—we just decided to abandon our bid, and I asked him if he wanted the policies, and he said how much would they cost, and I told him, and he said he wasn't going to spend another cent on the property, and I said I was going to cancel them. He says, 'You do what you think best. I am not going to spend another cent on them'.

Q. Following that did you surrender the policies through the Corn Exchange?

A. I sent them to Mr. Gottlieb.

Q. Did you advise Mr. Kennedy?

A. I advised Mr. Kennedy sometime after that, telling him I was going to cancel the policies again. Our previous meeting was oral—I mean, we talked this over; I don't think it was over the telephone, as Mr. Kennedy said; although it may have been. I think it was in my office and then, later on, I wrote a letter, and I received no reply to that letter, as far as my recollection goes.

Q. At the time of the oral conversation what did Mr. Kennedy say when you advised him that you were going to surrender these policies or intended to surrender them?

A. He said, 'You do whatever you think is necessary for your client,'—the substance of it: he said, 'you do whatever you think is necessary for your client.'

Q. Do you have a copy of the letter on the subject of this conversation?

A. I believe I handed it to you, Mr. Schell. I believe it has been identified already, if I am not mistaken.

Q. Is that it (indicating)?

A. Yes; that's a copy of the letter that I wrote to Mr. Kennedy on February 6th. Do you want me to read it?

Q. Yes; read it.

Mr. Shapiro: I object. There has been no proof that this letter was received. He couldn't answer the question whether he received it or not.

[fol. 225] The Court: He said that he could not say one way or the other or he could not recall.

Mr. Shapiro: That is right, your Honor.

Mr. Schell: Are you objecting to it?
Mr. Shapiro: No; I am not objecting to it.

By Mr. Schell:

Q. Do you have a copy of a letter—is this the only copy of the letter which you have, following your conversation with Kennedy?

A. It is.

Q. Was there any other correspondence relative to these policies?

A. I think this is the only one, Mr. Schell, after our oral conversation.

Q. And then, following this communication, what did you do with the policies?

A. I don't know how soon, but some time after that I sent them to Mr. Gottlieb; to the bank directly.

Mr. Schell: I offer in evidence this letter heretofore marked Defendants' Exhibit 1 for identification.

(The said exhibit reads as follows:

'February 6, 1932.

Mr. John M. Kennedy, 3rd, Widener Building, Philadelphia, Penna.

Re Glenwood Industrial Products Company

Dear Mr. Kennedy:

I was wondering whether or not you have covered the property with the necessary insurance.

[fol. 226] Since we decided to abandon our bids at the Sheriff's Sale, I am handing the various policies which were in my possession back to the Bank.

Very truly yours, —— ——.')"

NSW/ES.

And on Rec., p. 151:

"By Mr. Shapiro:

Q. Isn't it true that at no time in any of your discussions with Mr. Kennedy did he give you his consent, so far as he was concerned, to cancel the policies? Isn't that true?

Mr. Schell: That is objected to.

The Court: The trouble is you are usurping the functions of the jury. Now, ask him what Mr. Kennedy did.

By Mr. Shapiro:

Q. Is it not true that Mr. Kennedy said, when you told him that you were thinking of cancelling these policies, that so far as he was concerned he would not pay any more money and in so far as he was concerned, you could do what you thought best for the interest of your client?

A. That's the substance of it.

Q. Did he ever at any time tell you that you could cancel all these policies?

A. He never did."

As we before said, the issue in this case was whether or not the policies were in force as to Kennedy at the date of their expiration. They were admittedly not in force as to the Corn Exchange Bank.

The evidence will not sustain the contention that Kennedy acquiesced in the cancellation of the policies. He told Winnet, attorney of the Corn Exchange Bank, that he was not "going to spend another cent on the property", covered by the policies and he could do what he thought best [fol. 227] for his client which admittedly might have involved cancellation. This was in substance all that he said. There was not a word in this conversation about acquiescence on the part of Kennedy in the sense that he was consenting to anything Winnet did as relieving the companies of their contract obligation to give Kennedy notice if they decided to cancel the policies. Neither is there in the letter later written by Winnet to Kennedy. In the letter he said to Kennedy, "I am handing the various policies which were in my possession back to the bank." Winnet was not the agent of the insurance companies and any conversation or correspondence between him and Kennedy did not and could not release the insurance companies from their written obligation to Kennedy. And, besides, what took place between Winnet and Kennedy was never brought to the knowledge of the companies. The evidence was not sufficient for the jury to spell out of it acquiescence on the part of Kennedy to cancellation so as to relieve the companies of the necessity of giving him notice. It was, therefore, error to submit the question of acquiescence to the jury.

If Kennedy did not acquiesce in the cancellation of the policies they were in force as to him.

These policies protected not only the Corn Exchange Bank, but also Kennedy. They constituted a contract between him

and the companies, and whatever the Corn Exchange Bank did, Kennedy had the contractual right to notice of cancellation by the companies and the policies continued in force for the benefit of him for ten days after notice. No notice to Kennedy was ever given by the companies and without such notice the policies could not be cancelled. They expressly provide that "then", when the notice of cancellation has been given, "this company shall have the right • • • to cancel this agreement", but not until then. Kennedy had [fol. 228] the right to rely upon this provision in the policies and the record is devoid of anything which took it away from him.

There were no factual contradictions in the evidence. This was assumed to be true by the parties. The plaintiff requested him to instruct the jury, "that under the evidence and the pleadings, your verdict must be for the plaintiff" and the defendant requested him to instruct the jury that, "under the pleadings and the evidence, the verdict must be for the defendants". The rule of the law is well established that "where both parties request a peremptory instruction and do nothing more they thereby assume the facts to be undisputed and, in effect, submit to the trial judge the determination of the inferences proper to be drawn therefrom". Williams v. Vreeland, 250 U. S. 295, 298. The action of the parties took the case from the jury and there was nothing for it to pass upon. In any event, the evidence will not sustain the verdict for the defendant. We did not go quite far enough when the case was here before. Under the authority of Baltimore & Carolina Line, Inc. v. Redman, 295 U. S. 654 and Kaeppel v. Mutual Life Insurance Company of New York, 78 Fed. (2d) 899, the petition for rehearing is denied and the case remanded to the District Court with directions to enter judgment for the plaintiff for $11,000 with interest thereon from March 25, 1932, the amount counsel agreed to be due the plaintiff if she is entitled to a judgment.

A true Copy. Teste:

—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 229] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1935

No. 5859

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—Filed January 29, 1937

And Now, to wit, January 29, 1937, after due consideration, the petition for rehearing in the above-entitled case is hereby denied.

Philadelphia, —— —, ——.

J. Warren Davis, Circuit Judge.

[File endorsement omitted.]

[fol. 230] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1935

No. 5860

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—Filed January 29, 1937

And Now, to wit, January 29, 1937, after due consideration, the petition for rehearing in the above-entitled case is hereby denied.

Philadelphia, —— —, ——.

J. Warren Davis, Circuit Judge.

[File endorsement omitted.]

[fol. 231] In United States Circuit Court of Appeals for the Third Circuit, October Term, 1935

No. 5861

[Title omitted]

Order Denying Petition for Rehearing—Filed January 29, 1937

And Now, to wit, January 29, 1937, after due consideration, the petition for rehearing in the above-entitled case is hereby denied.

Philadelphia, ——\—, ——.

J. Warren Davis, Circuit Judge.

[File endorsement omitted.]

[fol. 232] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 233] Supreme Court of the United States, October Term, 1936

No. 753

Order Allowing Certiorari—Filed March 29, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 234] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1936

No. 754

ORDER ALLOWING CERTIORARI—Filed March 29, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 235] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1936

No. 755

ORDER ALLOWING CERTIORARI—Filed March 29, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File Nos. 41,293, 41,294, 41,295. U. S. Circuit Court of Appeals, Third Circuit. Term No. 753. Ætna Insurance Company, petitioner, vs. John M. Kennedy, 3d, to the use of Anna L. Bogash. Term No. 754. Springfield Fire & Marine Insurance Company, petitioner, vs. John M. Kennedy, 3d, to the use of Anna L. Bogash. Term No. 755. The Liverpool and London and Globe Insurance Company, Limited, petitioner, vs. John M. Kennedy, 3d, to the use of Anna L. Bogash. Petition for writs of certiorari and exhibit thereto. Filed February 25, 1937. Term Nos. 753, O. T., 1936, 754, O. T., 1936, 755, O. T., 1936.

FEB 25 1937
CHARLES ELMORE CRO
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IN THE

Supreme Court of the United States

No. 753. **October Term, 1936.**

AETNA INSURANCE COMPANY,
Petitioner,

v.

JOHN M. KENNEDY, 3d, to the Use of ANNA L. BOGASH,
Respondent.

No. 754. **October Term, 1936.**

SPRINGFIELD FIRE & MARINE INSURANCE COMPANY,
Petitioner,

v.

JOHN M. KENNEDY, 3d, to the Use of ANNA L. BOGASH,
Respondent.

No. 755. **October Term, 1936.**

THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, LIMITED,
Petitioner,

v.

JOHN M. KENNEDY, 3d, to the Use of ANNA L. BOGASH,
Respondent.

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit and Brief in Support Thereof.

HARRY S. AMBLER, JR.,
HORACE M. SCHELL,
ROBERT T. McCRACKEN,
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1421 Chestnut Street,
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IN THE

Supreme Court of the United States.

October Term, 1936. No. .

AETNA INSURANCE COMPANY,

Petitioner,

v.

JOHN M. KENNEDY, 3RD, TO THE USE OF ANNA L. BOGASH,

Respondent.

October Term, 1936. No. .

SPRINGFIELD FIRE & MARINE INSURANCE COMPANY,

Petitioner,

v.

JOHN M. KENNEDY, 3RD, TO THE USE OF ANNA L. BOGASH,

Respondent.

October Term, 1936. No. .

THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, LIMITED,

Petitioner,

v.

JOHN M. KENNEDY, 3RD, TO THE USE OF ANNA L. BOGASH,

Respondent.

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners above named (defendants below) pray that writs of certiorari issue to review the judgments and decrees of the Circuit Court of Appeals for the Third Circuit entered on January 29, 1937, denying petitions for rehearing and remanding the above cases to the District Court with direction to enter judgments for respondent (plaintiff below).

These judgments and decrees constituted, in effect, a reversal of the prior judgments of the Circuit Court of Appeals entered on January 16, 1936 remanding the cases for new trial.

These judgments also reversed the judgments of the District Court for the Eastern District of Pennsylvania entered upon verdicts of a jury in favor of your petitioners (defendants below) (Rec. pp. 183, 184, 185).

QUESTIONS PRESENTED.

The primary questions presented in these cases concern your petitioners' right to trial by jury under the Seventh Amendment of the Constitution, which provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

The questions are:

1. Did the parties waive their right to trial by jury by submitting to the trial court requests for directed verdicts, although at the same time they submitted numerous other points for charge?

2. Did the Circuit Court of Appeals, after a case has been submitted to a jury below, without reservation of any points of law, deny the right to trial by jury when it reversed verdicts and judgments in favor of petitioners and directed the entry of judgments in favor of respondent?

In order to properly dispose of the cases, certain subsidiary questions must be considered. These are as follows:

1. Was there sufficient evidence to go to a jury on the question of respondent's consent to the cancellation of the insurance policies involved in this suit?

2. Assuming there was sufficient evidence of consent to cancellation, was it necessary for the insurance companies to give formal notice of cancellation thereafter?

STATEMENT OF THE CASE.

These cases are identical and were tried together below. They arise out of a fire in an old brewery property. Respondent, Kennedy (legal plaintiff below) held a first mortgage on the property. The Corn Exchange National Bank held a second mortgage and had taken out fire insurance policies with your petitioners (defendants below) on the property. The policies provided (Rec. p. 74):

> "It is understood that the buildings insured hereunder are now under foreclosure proceedings by the Corn Exchange National Bank & Trust Co. The premium being paid by the Corn Exchange National Bank & Trust Co., it is agreed that in event of loss, same will be adjusted with the Corn Exchange National Bank & Trust Co. and paid to them and John M. Kennedy, 3rd, Mortgagee, as interest may appear."

They also provided that the insurance companies might cancel on ten days' notice (Rec. p. 75).

The Corn Exchange National Bank decided to abandon its interest as worthless. It went to the respondent, Kennedy, advised of its intention to cancel the policies, and suggested he take them over. Kennedy stated that he would not take the policies over and that the Bank might do with them what it thought best. He was subsequently advised several times that the policies would be cancelled and raised no objection. (For a report of the testimony see the evidence of Kennedy (Rec. p. 111) and Winnet (Rec. pp. 147 to 150), and the opinions of the Circuit Court of Appeals (Rec. pp. 201-221).)

The Bank surrendered the policies for cancellation and the unearned premium for the unexpired term was paid to it February 27, 1932 (Rec. pp. 126-127). The Bank had paid the premiums on the policies at the time they were written (Rec. p. 130). Sometime thereafter, to wit, March 25, 1932 (Rec. p. 9) the brewery burned. After the fire Bogash, the use plaintiff, bought respondent's interest and commenced the present actions against your petitioners on the insurance policies.

The cases proceeded to trial together. At the trial both sides presented elaborate points for charge including, among others, requests for directed verdicts (Plaintiff's points, Rec. pp. 172 to 175; Defendants' points, Rec. pp. 175 to 178). The court refused both motions for directed verdicts and, without reserving any questions of law, submitted the cases to the jury. The jury found in favor of your petitioners (Rec. p. 178). Respondent filed a motion for a new trial in each of the cases (Rec. pp. 1, 3, and 5). There was no motion filed by respondent for judgment in his favor. The motions for new trial were dismissed (See opinion of

trial judge, Rec. pp. 180 to 183), and judgments were entered on the verdicts. The respondent appealed to the Circuit Court of Appeals. On January 16, 1936, the Circuit Court of Appeals reversed and remanded the cases for a new trial on the ground that the District Court failed to sufficiently emphasize to the jury the clauses in the insurance policies with respect to notice of cancellation. It directed the case should be sent back for retrial so that the jury might pass on whether respondent had both consented to cancellation and waived his alleged right to notice of cancellation (Rec. p. 204).

Your petitioners, convinced that a person who had consented to cancellation was not entitled to formal notice of his own act, and that the notice clause was applicable only where the policies were cancelled at the instance of the insurance companies, and convinced that the question of consent to cancellation had been adequately presented to the jury, thereupon presented petitions for rehearing, in accordance with Rule 27 of the Circuit Court of Appeals, permitting one rehearing within sixty (60) days of final judgment.

One year later and long after the term had expired, the Circuit Court of Appeals denied the petitions for rehearing. It nevertheless changed its prior opinion completely and held there was not sufficient evidence to go to the jury on the question of consent to cancellation. It also held that the parties had waived their right to trial by jury by submitting requests for directed verdicts, although at the same time they submitted numerous other points for charge. It thereupon, purportedly on the authority of:

BALTIMORE & CAROLINA LINE v. REDMAN, 295 U. S. 654,

proceeded to direct the entry of judgments for respondent.

Wherefore your petitioners are now before this court.

SPECIFICATIONS OF ERRORS.

The Circuit Court of Appeals erred:

1. In holding that the parties waived their right to trial by jury by submitting to the trial court requests for directed verdicts, although at the same time they also submitted numerous other points for charge.

2. In holding that, although the cases had been submitted to the jury below without the reservation of any points of law, it had the power to reverse the judgments in favor of your petitioners and direct the entry of judgments in favor of respondent.

3. In directing the entry of judgments for respondent and thereby denying your petitioners right to trial by jury.

4. In holding that there was not sufficient evidence on the question of consent to cancellation of the insurance policies to go to the jury.

5. In holding that regardless of consent to cancellation, respondent was thereafter entitled to formal notice of his own act of cancellation and that the trial court did not fairly present this matter to the jury.

6. In holding that the clause in the policies requiring notice of cancellation was applicable in this case where the companies did not seek to cancel the policies of their own initiative.

REASONS FOR GRANTING THE WRITS.

1. The decision of the Circuit Court of Appeals holding that the submission by the parties to the trial court of numerous points for charge including, among others, mo-

tions for directed verdicts, amounted to a waiver of the right to trial by jury, is in conflict with and a serious misapplication of the decision of this court in:

WILLIAMS v. VREELAND, 250 U. S. 295.

The decision is also in conflict with the decisions of the other Circuits decided since WILLIAMS v. VREELAND, supra, and applying the same. These decisions are as follows:

BANK OF UNION v. FIDELITY & CASUALTY CO. OF N. Y., 62 Fed. (2d) 1040 (C. C. A. 8);

W. A. HOVER & CO. v. DENVER & RIO GRANDE W. RAILROAD CO., 17 Fed. (2d) 881 (C. C. A. 8);

UNDERWRITERS FINANCE CORP. v. UNION INDEMNITY CO., 61 Fed. (2d) 865 (C. C. A. 7).

2. The decision of the Circuit Court of Appeals holding that, although no questions of law were reserved below when the cases were submitted to the jury, it had the power to reverse judgments in favor of your petitioners and enter judgments in favor of the respondent is in conflict with:

SLOCUM v. NEW YORK LIFE INSURANCE CO., 228 U. S. 364,

and a serious misapplication of the decision of this Court in:

BALTIMORE & CAROLINA LINE v. REDMAN, 295 U. S. 654.

The decision is also in conflict with the decisions of the other Circuits decided since BALTIMORE & CAROLINA LINE v. REDMAN, supra, and applying the same. These decisions are as follows:

WOLFE v. PENNSYLVANIA RAILROAD, 82 Fed. (2d) 164 (C. C. A. 2);

HEFFNER v. PENNSYLVANIA RAILROAD COMPANY, 81 Fed. (2d) 28 (C. C. A. 2);

THOMSON v. DOWNEY, 78 Fed. (2d) 487 (C. C. A. 7).

Your petitioners earnestly submit that the orders of the Circuit Court of Appeals constituted denials of your petitioners' right to trial by jury under the Seventh Amendment. Your petitioners further feel that it would be particularly appropriate to review these cases because the two errors above noted are far-reaching and will lead to numerous similar denials of the right to jury trial, to say nothing of the injustice done to your petitioners.

WHEREFORE, petitioners pray that this Court may issue its writs of certiorari to review the decision of the Court below.

AETNA INSURANCE COMPANY,
SPRINGFIELD FIRE & MARINE INSURANCE COMPANY, and
THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, LIMITED,
By HARRY S. AMBLER, JR.,
HORACE M. SCHELL,
ROBERT T. MCCRACKEN,
Their Attorneys.

Brief in Support of Petition.

OPINIONS BELOW.

The opinion of the District Court sur motion for new trial filed February 11, 1935, is printed in the Record at page 180 and is not reported.

The original opinion of the Circuit Court of Appeals, filed January 16, 1936, is printed in the Record at page 201, and is not yet reported.

The opinion of the Circuit Court of Appeals sur petition for rehearing, filed January 29, 1937, is printed in the Record at page 221, and is not yet reported.

JURISDICTION.

The original decision of the Circuit Court of Appeals for the Third Circuit was rendered January 16, 1936. Petitions for rehearing were promptly presented on January 29, 1936, in accordance with Rule 27 of the Circuit Court of Appeals and the decision denying the petitions for rehearing was rendered on January 29, 1937.

The jurisdiction of this Court is invoked under Sec. 240 (a) of the JUDICIAL CODE, as amended.

OUTLINE OF ARGUMENT.

The statement of the case, supra, sets forth the pertinent facts. This argument is confined to the question of the propriety of granting the present writs of certiorari. It considers briefly the question of the right to trial by jury and the question of the waiver of that right. It concludes by pointing out that the only issue in the cases, namely, the question of consent to the cancellation of insurance policies, was fairly presented to the jury, and it submits that this Court can properly remedy the errors of the Circuit Court of Appeals by reversing the judgments of that Court and reinstating the judgments of the District Court.

ARGUMENT.

1. Right to Trial by Jury.

We earnestly submit that your petitioners have been deprived of their right to trial by jury guaranteed by the Seventh Amendment. It will be recalled that at the trial these cases were submitted to the jury without qualification and without the reservation of any points of law and that the jury rendered verdicts for your petitioners. In spite of this, the Circuit Court when it denied rehearing, undertook to reverse the judgments of the District Court entered on the verdicts and to direct judgments for the respondent on the ground that there was not sufficient evidence to go to the jury on the question of consent to cancellation, notwithstanding the fact that the only matters before the Court were respondent's motions for new trial.

This practice was, we believe, specifically condemned in:

SLOCUM v. NEW YORK LIFE INSURANCE COMPANY, supra.

In that case this Court pointed out that at common law after a case had been submitted without qualification to a jury, it was impossible for any court thereafter to overthrow the verdict and enter judgment for the opposite party on the ground that there was not sufficient evidence to go to the jury. The Court pointed out that at common law it was necessary under such circumstances to send the case back for a new trial. The Court further held that the Seventh Amendment guaranteed the preservation of common law forms and that, consequently, a Federal Court was without power to overthrow a verdict and judgment in favor of one party and enter it in favor of the other. The doc-

trine of this case, we submit, is directly applicable here and conclusively indicates that the Circuit Court in directing judgments for the respondent, exceeded its powers under the Constitution.

The Circuit Court, in rendering the decrees, relied upon

BALTIMORE & CAROLINA LINE v. REDMAN, supra.

In that case, however, the trial court, did not submit the case to the jury without qualification. In accordance with a well recognized common law practice, it reserved its decision as to the sufficiency of evidence and on other questions of law when it submitted the case to the jury. Solely because of these reservations, this Court permitted the reversal of the judgment entered on the verdict and the entry of a judgment for the opposing party. We believe the Court was careful to qualify, and not to overrule, the Slocum Case and that the Court did not intend to sanction orders such as those made by the Circuit Court under the circumstances existing in these cases.

We are confirmed in this view by the decisions of the Seventh and Second Circuits. These decisions are as follows:

THOMSON v. DOWNEY, 78 Fed. (2d) 487;
HEFFNER v. PENNSYLVANIA RAILROAD COMPANY, 81 Fed. (2d) 28;
WOLFE v. PENNSYLVANIA RAILROAD COMPANY, 82 Fed. (2d) 164.

The following statement from THOMSON v. DOWNEY, supra, is typical of these holdings (page 491):

> "In Baltimore & Carolina Line v. Redman, 55 S. Ct. 890, 79 L. Ed. —, decided by the Supreme Court on June 3, 1935, the Court held that, where the trial

court had reserved its rulings until after the verdict on motions to dismiss for lack of evidence, and for peremptory instruction, and after the verdict had held the evidence sufficient and the motions ill-grounded, and accordingly entered a judgment for plaintiff on the verdict, then the Circuit Court of Appeals was warranted upon reversal of judgment for the plaintiff in directing the trial court to dismiss the declaration. In this case, however, the trial court did not reserve its rulings on motions to dismiss and for a directed verdict, but promptly overruled them before instructing the jury. The Redman Case, therefore, is not authority for us to direct a judgment of dismissal."

It is unfortunate, we believe, to have confusion on such a fundamental question of practice, as well as a great hardship to your petitioners.

2. Waiver of the Right to Trial by Jury.

The Circuit Court suggests that your petitioners waived their right to trial by jury. We are frank to confess that we do not know how seriously the Circuit Court relied upon this proposition. However, the Court undoubtedly makes the suggestion that, because both sides submitted points for charge including among them requests for directed verdicts, there was a waiver of the right to go to a jury. (In this connection see Record pp. 172-178, where it appears that both parties submitted at least a dozen points for charge, concluding with requests for directed verdict.) This is the common practice in practically every jury trial case. No one ever imagined that the submission of points for charge in this manner constituted a waiver of a right to trial by jury.

Nor did this Court ever suggest that such was the case.

In:

WILLIAMS v. VREELAND, supra,

the Court held that if both parties asked for directed verdicts and did nothing more (i. e. did not submit other points for charge) they might be deemed to have waived their right to trial by jury. The case obviously has no application here.

Our view in this respect is confirmed by a number of decisions from the other Circuits which point out this limitation on Williams v. Vreeland and which, incidentally, are in direct conflict with the present decision. In this connection see:

BANK OF UNION v. FIDELITY & CASUALTY CO. OF N. Y., 62 Fed. (2d) 1040 (C. C. A. 8);

UNDERWRITERS FINANCE CORP. v. UNION INDEMNITY CO., 61 Fed. (2d) 865 (C. C. A. 7);

W. A. HOVER & CO. v. DENVER & RIO GRANDE W. RAILROAD CO., 17 Fed. (2d) 881 (C. C. A. 8).

The following is a typical statement from:

BANK OF UNION v. FIDELITY & CASUALTY CO. OF N. Y., supra, (page 1041):

> "Ordinarily, where both parties move for a directed verdict without reservations, it amounts to a waiver of a jury trial, and a submission to the court of questions of fact as well as of law. Beuttell v. Magone, 157 U. S. 154, 15 S. Ct. 566, 39 L. Ed. 654; Williams v. Vreeland, 250 U. S. 295, 39 S. Ct. 438, 63 L. Ed. 989, 3 A. L. R. 1038. But, where a party makes such motion, and at the same time requests instructions to the jury which show he does not intend to waive his right to jury trial if his motion is overruled, he cannot be held to have waived a trial by jury of the fact questions."

Under these cases it is clear there was no waiver of the right to trial by jury. Again, we believe it appropriate to grant review because this represents a fundamental misunderstanding of WILLIAMS v. VREELAND, supra, which may very well lead to confusion in numerous future cases tried before juries.

3. Affirmance of Judgment of District Court Suggested.

We submit, finally, that the fundamental errors in these cases which culminated in the denial of your petitioners' right to trial by jury can be appropriately remedied by reversing the decrees of the Circuit Court and affirming the judgments of the District Court.

The sole issue in these cases was whether or not respondent had consented to the cancellation of the insurance policies sued upon. This matter was fairly submitted to the jury and they found in your petitioners' favor. Under the circumstances, there is no need for a new trial.

The suggestion that there was not sufficient evidence of consent for the jury to find in your petitioners' favor is, we believe, without merit. The District Court clearly felt there was sufficient evidence. The Circuit Court did also, as evidenced by its first opinion. The testimony as to consent is fully set forth in the Record pp. 111, 147 to 150. This evidence was not disputed and established that respondent had been advised of the second mortgagee's intention to cancel the policies. He refused to take them over and gave the second mortgagee permission to do what it pleased with them. He was subsequently advised further of the second mortgagee's intention to cancel and raised no objection. The jury from this conduct could clearly infer that respondent had unqualifiedly consented to cancellation.

In its first opinion, the Circuit Court, while conceding the above, suggested the cases should be sent back to the jury, to pass on whether respondent's conversations constituted a waiver of the right to notice of cancellation. This suggestion is clearly erroneous. A man who has consented without qualification to cancellation clearly does not expect to receive formal notice of his own act and there was no necessity of the jury passing on that question. As a matter of fact, the Circuit Court relies for its position on a clause in the policies which had no application. The clause providing for cancellation on notice was inserted solely to permit the insurance companies to terminate the policies of their own initiative in the event that they no longer desired to carry the risk. It was never intended to apply to cases in which the insured undertook to cancel the policies. It has never been said that a policy of insurance cannot be cancelled by mutual consent. (For authorities see Petition for Reargument, Rec. pp. 213 to 216.)

The sole issue, we repeat, was whether the respondent had consented to cancellation and this factual issue was fairly presented to the jury, who found in your petitioners' favor. Under the circumstances, we believe that a correction of the Circuit Court's errors in practice and the rendition of substantial justice in these cases will be expeditiously achieved by a reversal of the judgments of the Circuit Court and the affirmance of the judgments of the District Court.

Respectfully submitted,

HARRY S. AMBLER, JR.,
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Attorneys for Petitioners.

APR 22 1937
CHARLES ELMORE CROPLEY

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1936. No. 753.

AETNA INSURANCE COMPANY,
Petitioner,

v.

JOHN M. KENNEDY, 3rd, to the Use of ANNA L. BOGASH,
Respondent.

October Term, 1936. No. 754.

SPRINGFIELD FIRE & MARINE INSURANCE COMPANY,
Petitioner,

v.

JOHN M. KENNEDY, 3rd, to the Use of ANNA L. BOGASH,
Respondent.

October Term, 1936. No. 755.

THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, LIMITED,
Petitioner,

v.

JOHN M. KENNEDY, 3rd, to the Use of ANNA L. BOGASH,
Respondent.

BRIEF FOR PETITIONERS.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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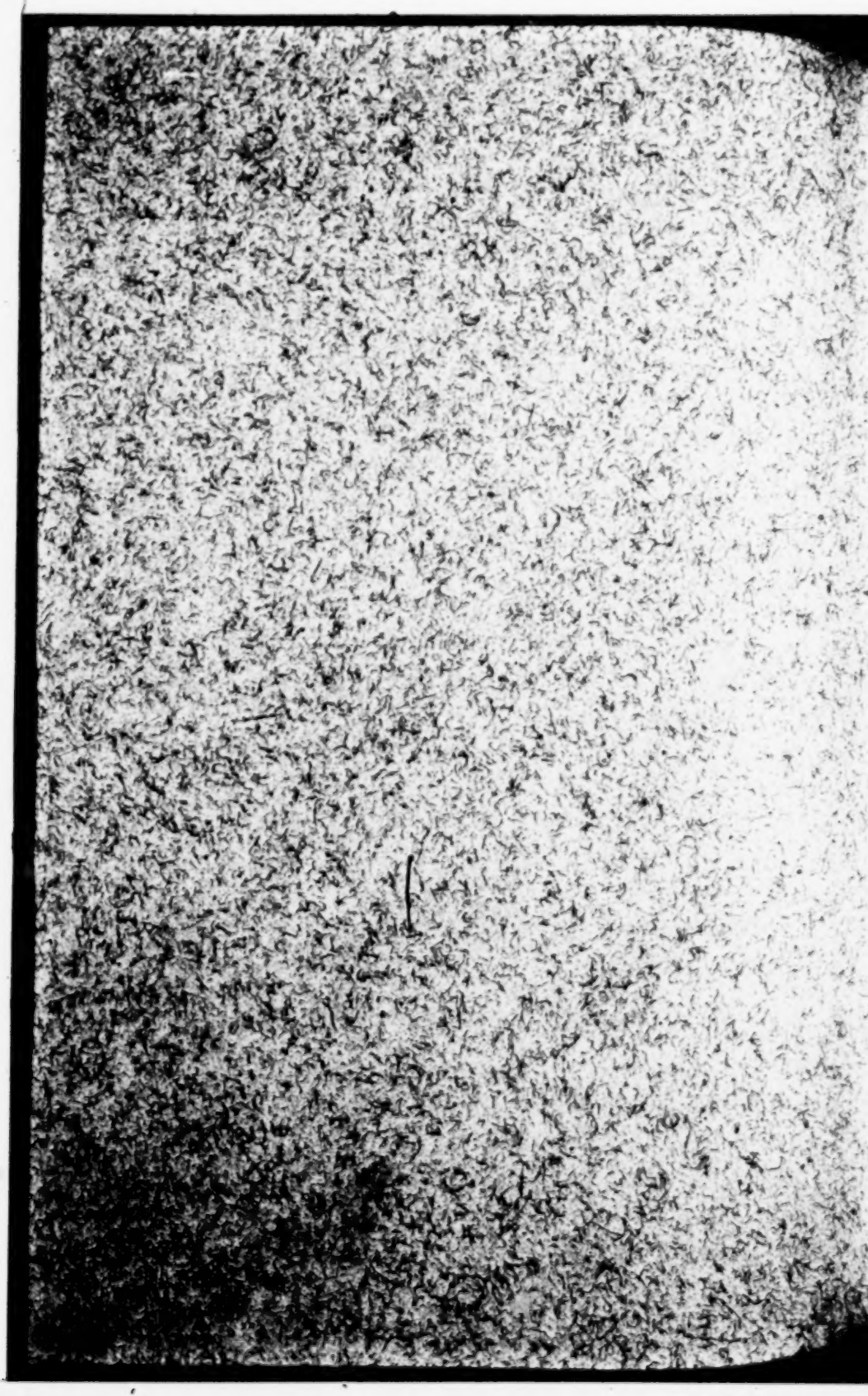

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IN THE

Supreme Court of the United States

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THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, LIMITED,
Petitioner,

v.

JOHN M. KENNEDY, 3rd, to the Use of ANNA L. BOGASH,
Respondent.

BRIEF FOR PETITIONERS ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

I. OPINIONS BELOW.

The opinion of the District Court sur motion for new trial filed February 11, 1935, is printed in the Record at pages 133-135 and is not reported.

The original opinion of the Circuit Court of Appeals, filed January 16, 1936, is printed in the Record at page 148, and is reported in 87 Federal (2nd) 683.

The opinion of the Circuit Court of Appeals sur petition for rehearing, filed January 29, 1937, is printed in the Record at page 157, and is reported in 87 Federal (2nd) 684.

II. JURISDICTION.

The original decision of the Circuit Court of Appeals for the Third Circuit was rendered January 16, 1936. Petitions for rehearing were promptly presented on January 29, 1936, in accordance with Rule 27 of the Circuit Court of Appeals and the decision denying the petitions for rehearing was rendered on January 29, 1937.

The jurisdiction of this Court is invoked under

Sec. 240 (a) of the JUDICIAL CODE, as amended.

III. STATEMENT OF THE CASE.

These cases are identical and were tried together below. They arise out of a fire in an old brewery property owned by the Glenwood Industrial Distilling Company. Respondent, Kennedy (legal plaintiff below) held a first mortgage on the property. The Corn Exchange National Bank and Trust Company held a second mortgage and had taken out fire insurance policies on the property with petitioners (defendants below). The policies provided (Rec. pp. 40, 53, 64):

> "'It is understood that the buildings insured hereunder are now under foreclosure proceedings by the Corn Exchange National Bank & Trust Co. The premium being paid by the Corn Exchange National Bank & Trust Co., it is agreed that in event of loss, same will be adjusted with the Corn Exchange National Bank & Trust Co. and paid to them and John M. Kennedy, 3rd, Mortgagee, as interest may appear.''

They also provided that the insured might cancel at any time (Rec., pp. 45, 57), and that the insurance companies might cancel on ten days' notice (Rec. pp. 40, 53, 63).

The Corn Exchange National Bank decided to abandon its interest in the property as worthless. Its representative, Winnet, advised Kennedy of the bank's intention to cancel the policies and suggested he take them over. Kennedy at that time clearly indicated his consent to cancellation. His version of the transaction is as follows (Rec., p. 82):

> "A. As I recall the telephone conversation, Mr. Winnet said that he was cancelling, unless I chose to buy or take over the policies, to pay the unexpired premium. As I understood him, he was cancelling. I told him that I didn't intend to pay any unexpired premium or anything else, that I intended to put no further money into that building."

Winnet testified similarly as to the transaction (Rec., p. 109). Subsequently Winnet advised Kennedy by mail that the policies would be cancelled and he raised no objection (Rec., p. 110).

The bank thereafter surrendered the policies for cancellation and the unearned premiums for the unexpired term were paid to it February 27, 1932 (Rec., p. 116). The bank had paid the premiums on the policies at the time they were written (Rec., p. 96). Sometime thereafter, to wit, March 25, 1932 (Rec., p. 5) the brewery burned. After the fire Bogash, the use plaintiff, bought respondent's interest and commenced the present actions against your petitioners on the insurance policies.

The cases proceeded to trial together. At the trial both sides presented elaborate points for charge including, among others, requests for directed verdicts (Plaintiff's points, Rec., pp. 127-129; Defendants' points, Rec., pp. 129-131). The court refused the motions for directed verdicts

and, without reserving any questions of law, submitted the cases to the jury. The jury found in favor of petitioners (Rec., p. 132). Respondent filed a motion for a new trial in each of the cases. There was no motion filed by respondent for judgment in his favor. The motions for new trial were dismissed (See opinion of trial judge, Rec., pp. 133-135) and judgments were entered on the verdicts. The respondent appealed to the Circuit Court of Appeals. On January 16, 1936, the Circuit Court of Appeals reversed and remanded the cases for new trial on the ground that the District Court failed to emphasize sufficiently to the jury the clauses in the insurance policies with respect to notice of cancellation. It directed the cases should be sent back for retrial so that the jury might pass on whether respondent had both consented to cancellation and waived his alleged right to notice of cancellation (Rec., p. 150).

Your petitioners, convinced that a person who had consented to cancellation was not entitled to formal notice of his own act and that the notice clauses were applicable only where the policies were cancelled at the instance of the insurance companies, and convinced that the question of consent to cancellation had been adequately presented to the jury, thereupon presented petitions for rehearing, in accordance with Rule 27 of the Circuit Court of Appeals, permitting one rehearing within sixty (60) days of final judgment (Rec., pp. 152-157).

One year later and long after the term had expired, the Circuit Court of Appeals denied the petitions for rehearing. It nevertheless changed its prior opinion completely and held there was not sufficient evidence to go to the jury on the question of consent to cancellation. It also held that the parties had waived their right to trial by jury by submitting requests for directed verdicts, although at the same time they submitted numerous other points for charge. It thereupon, purportedly on the authority of:

BALTIMORE & CAROLINA LINE v. REDMAN,
295 U. S. 654,

proceeded to direct the entry of judgments for respondent. (Rec. pp. 157-162.)

Wherefore your petitioners are now before this court.

IV. SPECIFICATION OF ERRORS RELIED UPON.

The Circuit Court of Appeals erred:

1. In directing the entry of judgments for respondent and thereby denying your petitioners right to trial by jury.

2. In holding that, although the cases had been submitted to the jury below without the reservation of any points of law, it had the power to reverse the judgments in favor of your petitioners and direct the entry of judgments in favor of respondent.

3. In holding that the parties waived their right to trial by jury by submitting to the trial court requests for directed verdicts, although at the same time they also submitted numerous other points for charge.

4. In holding that there was not sufficient evidence on the question of consent to cancellation of the insurance policies to go to the jury.

5. In holding that regardless of consent to cancellation, respondent was thereafter entitled to formal notice of his own act of cancellation and that the trial court did not fairly present this matter to the jury.

6. In holding that the clause in the policies requiring notice of cancellation was applicable in this case where the companies did not seek to cancel the policies of their own initiative.

V. ARGUMENT.

Summary.

Point 1. Petitioners were denied their right to trial by jury.

Point 2. Petitioners did not waive their right to trial by jury.

Point 3. (A) The direction of judgments for respondent was not in conformity with the State practice.
(B) There was sufficient evidence to go to the jury on the question of consent to cancellation.

Point 4. Contracts of insurance may be cancelled by mutual consent.

Point 1. PETITIONERS WERE DENIED THEIR RIGHT TO TRIAL BY JURY.

The present cases were typical jury ones. Petitioners contended that respondent had consented to cancel the policies involved in suit prior to loss. The respondent denied this. The issue presented was a pure question of fact.

This was recognized by the trial judge who submitted the cases to the jury without qualification and without the reservation of any points of law. The jury rendered verdicts in favor of petitioners and judgments were duly entered thereon.

Respondent sought new trials in the District Court and, having been denied the same, appealed to the Circuit Court of Appeals. By its first opinion and decree the Circuit Court of Appeals granted new trials. Petitioners then applied for rehearings. The Circuit Court of Appeals, in denying the petitions for rehearing, rendered the decree of

which petitioners complain. They decided that there was not sufficient evidence to go to the jury on the question of consent to cancellation. They thereupon ordered that the judgments of the District Court entered on the verdicts, should be reversed and further directed the District Court to enter judgments for the respondent. We earnestly submit that the Circuit Court of Appeals thereby deprived petitioners of their right to trial by jury guaranteed by the Seventh Amendment.

The *Seventh Amendment of the Constitution* is as follows:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

The wording of the Amendment is significant. It first recites that in all suits the right to trial by jury shall be preserved. In order that there may be no doubt on the question, it further recites that no facts tried by a jury shall be otherwise re-examined than according to the rules of the common law. The Amendment as thus drawn is broad and emphatic. It was designed and intended to make the jury the sole trier of facts under all circumstances.

The rights guaranteed by this Amendment were carefully preserved by a number of decisions of this Court in the course of the nineteenth century. It is not necessary to review all of them. They are fully considered and commented upon in:

> SLOCUM v. NEW YORK LIFE INSURANCE COMPANY, 228 U. S. 364.

This case may well serve as a starting point for the present discussion. It is directly in point and specifically

condemns the decree rendered by the Circuit Court of Appeals in the present cases. Moreover, the Slocum Case was a very carefully considered decision. It contains an exhaustive review and examination of the common law and all the prior cases under the Seventh Amendment. In that case, the question presented was whether a life insurance policy had expired by reason of non-payment of premiums. The case was submitted to the jury who found a verdict in favor of the plaintiff. At the trial a motion for directed verdict was made by defendant and subsequently it moved for judgment non obstante veredicto upon the whole record. These motions were made conformably to a Pennsylvania statute which provided as follows:

Act of April 22, 1905, P. L. 286.

> "That whenever, upon the trial of any issue, a point requesting binding instructions has been reserved or declined, the party presenting the point may, within the time prescribed for moving for a new trial, or within such other or further time as the court shall allow, move the court to have all the evidence taken upon the trial duly certified and filed so as to become part of the record, and for judgment *non obstante veredicto* upon the whole record; whereupon it shall be the duty of the court, if it does not grant a new trial, to so certify the evidence, and to enter such judgment as should have been entered upon that evidence, at the same time granting to the party against whom the decision is rendered an exception to the action of the court in that regard. From the judgment thus entered either party may appeal to the Supreme or Superior Court, as in other cases, which shall review the action of the court below, and enter such judgment as shall be warranted by the evidence taken in that court."

The trial court denied the motion for judgment n. o. v., and the defendant appealed. The Circuit Court of Appeals,

in reliance upon the Pennsylvania statute, and because the evidence was not sufficient to sustain the jury, undertook to reverse the verdict and judgment of the court below and to enter judgment for defendant.

This court in a majority opinion delivered by Mr. Justice Van Devanter, held that the Circuit Court of Appeals, in rendering such decree, had violated the Seventh Amendment. After reviewing prior decisions the court said, *page 379*:

> "These decisions make it plain, first, that the action of the Circuit Court of Appeals in setting aside the verdict and assuming to pass upon the issues of fact and to direct a judgment accordingly must be tested by the rules of the common law; second, that, while under those rules that court could set aside the verdict for error of law in the proceedings in the Circuit Court and order a new trial, it could not itself determine the facts; and, third, that when the verdict was set aside there arose the same right of trial by jury as in the first instance. How, then, can it be said that there was not an infraction of the Seventh Amendment? When the verdict was set aside the issues of fact were left undetermined, and until they should be determined anew no judgment on the merits could be given. The new determination, according to the rules of the common law, could be had only through a new trial, with the same right to a jury as before. Disregarding those rules, the Circuit Court of Appeals itself determined the facts, without a new trial. Thus, it assumed a power it did not possess and cut off the plaintiff's right to have the facts settled by the verdict of a jury.
>
> "While it is true, as before said, that the evidence produced at the trial was not sufficient to sustain a verdict for the plaintiff and that the Circuit Court erred in refusing so to instruct the jury, this does not militate

against the conclusion just stated. According to the rules of the common law, such an error, like other errors of law affecting a verdict, could be corrected on writ of error only by ordering a new trial. In no other way could an objectionable verdict be avoided and full effect given to the right of trial by jury as then known and practiced. And this procedure was regarded as of real value, because, in addition to fully recognizing that right, it afforded an opportunity for adducing further evidence rightly conducing to a solution of the issues."

The Court then proceeded to discuss the instances at common law where the verdict of a jury could be disregarded and a case disposed of on appeal without new trial. It established that such instances were exceptional and existed only when, upon an examination of the pleadings (and not the evidence adduced at trial) it was clear that no factual issue was involved.

The present cases do not fall within any of the common law exceptions noted. The pleadings in the present cases presented a clear factual issue on the question of consent to cancellation. Therefore under the general rule announced in the Slocum Case, the Circuit Court of Appeals in the present cases was without power to overthrow the verdicts of the jury, on the ground that the evidence was not sufficient to justify their finding, and render judgments in favor of respondent. It was obliged to reverse the cases and remand them for new trial.

It should be particularly noted that in the Slocum Case this Court recognized that the Seventh Amendment was designed to preserve matters of real substance and not merely matters of form. In the majority opinion it was pointed out, on page *399*, that the right to a new trial was a valuable one because it afforded the losing party on appeal an opportunity to present further evidence if he could do so.

The Slocum Case has never been seriously questioned. It was followed in:

PEDERSON v. DELAWARE, LACKAWANNA & WESTERN RY. CO., 229 U. S. 146,
YOUNG v. CENTRAL RAILROAD OF N. J., 232 U. S. 602.

The next important case in this line of decisions is:

BALTIMORE & CAROLINA LINE v. REDMAN, 295 U. S. 654.

In this case plaintiff sued for personal injuries allegedly sustained through defendant's negligence. The case was submitted to the jury which rendered a verdict in favor of the plaintiff. Before the actual submission of the case the defendant had moved to dismiss the complaint because the evidence was insufficient to justify the submission of the case to the jury. The defendant also moved for a directed verdict in its favor. The court reserved its decision on both these motions and submitted the case to the jury subject to its opinion on the reserved points. After the jury's finding, the court denied defendant's motions and entered judgment on the verdict. The defendant appealed to the Circuit Court of Appeals which reversed the judgment and directed a new trial. The defendant then requested this Court to order the Circuit Court of Appeals to dismiss the case on the merits without a new trial.

This Court, in an opinion by Mr. Justice Van Devanter, granted defendant's request. It was careful, however, to distinguish, and not to overrule, the Slocum Case. In the decision it was pointed out that the case had been submitted to the jury with qualifications. The Court noted that this practice was recognized at common law and under a statute of the state in which the case was tried. The court justified its dismissal of the case on the merits solely because these points were reserved when the case was submitted to the jury.

The Baltimore & Carolina Line Case does not therefore justify the action of the Circuit Court of Appeals in the

present cases, and is clearly distinguishable. The present cases were submitted to the jury without qualification. There was no reservation of any questions of law with respect to the sufficiency of the evidence or otherwise.

The cases decided by the Circuit Courts of Appeals since the Baltimore & Carolina Line Case have recognized the limited scope of the decision. In:

THOMSON v. DOWNEY, 78 Fed. (2d) 487 (C. C. A. 7),

the Circuit Court of Appeals for the Seventh Circuit held that it could not reverse a verdict and judgment for plaintiff and render judgment for defendant where the case had been submitted to the jury without qualification. The inapplicability of the Baltimore & Carolina Line Case was noted as follows, at *page 491*:

> "In Baltimore & Carolina Line v. Redman, 55 S. Ct. 890, 79 L. Ed.—, decided by the Supreme Court on June 3, 1935, the Court held that, where the trial court had reserved its rulings until after the verdict on motions to dismiss for lack of evidence, and for peremptory instruction, and after the verdict had held the evidence sufficient and the motions ill-grounded, and accordingly entered a judgment for plaintiff on the verdict, then the Circuit Court of Appeals was warranted upon reversal of judgment for the plaintiff in directing the trial court to dismiss the declaration. In this case, however, the trial court did not reserve its rulings on motions to dismiss and for a directed verdict, but promptly overruled them before instructing the jury. The Redman Case, therefore, is not authority for us to direct a judgment of dismissal."

In harmony with this case see:

HEFFNER v. PENNSYLVANIA RAILROAD COMPANY, 81 Fed. (2d) 28 (C. C. A. 2).

Here the Circuit Court of Appeals for the Second Circuit said, *page 31*:

> "The defendant asks us to direct dismissal for lack of jurisdiction rather than to remand for a new trial. But the authority relied upon in support of this request, Baltimore & Carolina Line, Inc. v. Redman, 295 U. S. 654, 55 S. Ct. 890, 79 L. Ed. 1636, does not justify it. In that case decision of the motion was reserved until after verdict; here it was not; and Slocum v. New York Life Insurance Co., 228 U. S. 364, 33 S. Ct. 523, 57 L. Ed. 879, Ann. Cas. 1914D, 1029, controls."

WOLFE v. PENNSYLVANIA RAILROAD COMPANY, 82 Fed. (2d) 164 (C. C. A. 2).

Here the Circuit Court of Appeals for the Second Circuit said, *page 166*:

> "It is argued that we should direct the complaint to be dismissed under the rule laid down by the Supreme Court in Baltimore & Carolina Line, Inc., v. Redman, 295 U. S. 654, 55 S. Ct. 890, 79 L. Ed. 1636, but a new trial may only be avoided and final judgment rendered 'non obstante veredicto' where a motion to direct a verdict has been reserved and the verdict is taken subject to the reservation. In other situations the rule in Slocum v. New York Life Ins. Co., 228 U. S. 364, 33 S. Ct. 523, 57 L. Ed. 879, Ann. Cas. 1914D, 1029, is still the law in the federal courts."

These cases are in direct conflict with the decision of the Circuit Court of Appeals in the present cases. They substantially represent petitioners' position on the present appeal and their interpretation of this Court's decision in the Slocum and Baltimore & Carolina Line Cases. In reliance upon them, petitioners very earnestly submit that the Circuit Court of Appeals' direction to enter judgments in favor of respondent was an unwarranted usurpation of

power and constituted a denial of petitioners' right to trial by jury.

Point 2. PETITIONERS DID NOT WAIVE THEIR RIGHT TO TRIAL BY JURY.

In the course of its second opinion, the Circuit Court of Appeals sought to evade the jury trial issue by suggesting that your petitioners had waived their right to trial by jury. It suggests that, because both sides submitted requests for directed verdicts, they impliedly consented to take the cases from the jury. It relies in this connection upon:

WILLIAMS v. VREELAND, 250 U. S. 295.

The rule established in that case was succinctly stated by Mr. Justice McReynolds, on *page 298*, as follows:

> "The established rule is, 'Where both parties request a peremptory instruction and do nothing more they thereby assume the facts to be undisputed and, in effect, submit to the trial judge the determination of the inferences proper to be drawn therefrom.' "

This doctrine has no application to the present cases. In the present cases the motions for directed verdicts presented by the parties were embodied in the usual points for charge. Respondent submitted fifteen points for charge on various aspects of the cases and of these points 13, 14 and 15 were motions for directed verdicts (Rec., p. 129). The petitioners submitted twelve points for charge and the last of these was a motion for directed verdict (Rec., p. 131). In practically every jury case we have attended similar points have been presented, and it has never been imagined that their submission constituted a waiver of the right to trial by jury nor do we believe this Court ever suggested such a thing.

As just noted, this Court pointed out that a jury trial was waived only if both sides submitted requests for directed verdict and did nothing more. Undoubtedly this

Court had in mind that, if the parties accompanied their requests for directed verdict by other points for charge, there would be no waiver of a jury trial. Where both sides merely submit motions for directed verdict, the trial court would naturally be justified in assuming that the parties recognized there was no question of fact in dispute and that it was, therefore, authorized to dispose of the case itself. Where a number of points for charge are submitted by both sides, including requests for directed verdicts, no such assumption is warranted. The existence of these other points for charge indicates that both parties desire to go to the jury unless one of the motions for directed verdict is granted.

This limitation of the doctrine of William v. Vreeland, supra, has been pointed out in several cases.

BANK OF UNION v. FIDELITY & CASUALTY CO. OF N. Y., 62 Fed. (2d) 1040 (C. C. A. 8).

Here the Circuit Court of Appeals for the Eighth Circuit said, *page 1041*:

> "Ordinarily, where both parties move for a directed verdict without reservations, it amounts to a waiver of a jury trial, and a submission to the court of questions of fact as well as of law. Beuttell vs. Magone, 157 U. S. 154, 15 S. Ct. 566, 39 L. Ed. 654; Williams v. Vreeland, 250 U. S. 295, 39 S. Ct. 438, 63 L. Ed. 989, 3 A. L. R. 1038. But, where a party makes such motion, and at the same time requests instructions to the jury which show he does not intend to waive his right to jury trial if his motion is overruled, he cannot be held to have waived a trial by jury of the fact questions."

W. A. HOVER & CO. v. DENVER & RIO GRANDE RAILROAD CO., 17 Fed. (2d) 881 (C. C. A. 8).

Here the Circuit Court of Appeals for the Eighth Circuit said, *page 883*:

> "No waiver of the right to have a case submitted to a jury is presumed from a request for a directed verdict on the part of both parties, where there is coupled therewith a request for other instructions, or for the submission of disputed questions of fact to the jury. Minahan v. Grand Trunk Western Railway Co. (C. C. A.) 138 F. 37; Sigua Iron Co. v. Greene (C. C. A.) 88 F. 207."

See also:

EMPIRE STATE CATTLE CO. v. ATCHISON RAILWAY CO., 210 U. S. 1,

SAMPLINER v. MOTION PICTURE PATENTS COMPANY, 254 U. S. 233.

UNDERWRITERS' FINANCE CORP. v. UNION INDEMNITY CO., 61 Fed. (2d) 865 (C. C. A. 7).

In view of these authorities, and the well established trial practice, we submit there is no doubt that petitioners did not waive their right to jury trial.

The foregoing discussion has established, we believe, that the order of the Circuit Court of Appeals directing judgments for respondent constituted a denial of petitioners' rights under the Seventh Amendment. There are two further reasons why the direction for judgments was error in these cases. The first is that the order of the Circuit Court of Appeals was not in conformity with the state practice. The second is that in the present cases there was clearly sufficient evidence to go to the jury on the question of consent to cancellation.

Point 3 (a) THE DIRECTION OF JUDGMENTS WAS NOT IN CONFORMITY WITH STATE PRACTICE.

In the two leading cases which have previously been discussed at length, the Slocum Case and the Baltimore & Carolina Line Case, the importance of state practice was emphasized. In the Pennsylvania state courts, which are not bound by the Seventh Amendment, there is a special act which permits the rendition of a judgment contrary to verdict where the evidence does not justify the submission of a case to the jury. This statute is the same one which was considered previously in the Slocum Case. It has not been materially changed since. The present statute is as follows:

> ACT OF APRIL 22, 1905, P. L. 286, as amended April 9, 1925, P. L. 221 (12 Purdon's Penna. Statutes Annotated, Sec. 681).
>
> "Whenever, upon the trial of any issue, a point requesting binding instructions has been reserved or declined, the party presenting the point may within the time prescribed for moving for a new trial, or within such other or future time as the court shall allow, move the court to have all the evidence taken upon the trial duly certified and filed so as to become part of the record, and for judgment non obstante veredicto upon the whole record; whereupon it shall be the duty of the court, if it does not grant a new trial, to so certify the evidence, and to enter such judgment as should have been entered upon that evidence, at the same time granting to the party against whom the decision is rendered an exception to the action of the court in that regard. From the judgment thus entered either party may appeal to the Supreme or Superior Court, as in other cases, which shall review the action of the court below, and enter such judgment as shall be warranted by the evidence taken in that court."

This statute only empowers an appellate court to enter judgment contrary to the verdict when requests for binding instructions have been submitted at the trial, and when, after trial, a motion for judgment n. o. v. has been made upon the whole record. It has been repeatedly recognized by the Pennsylvania Supreme Court that unless both these motions are made it is without power to grant a judgment contrary to the verdict. In the absence of such motions the Pennsylvania Supreme Court must remand the case for new trial. One of the more recent cases in point is:

> COX, et al. v. ROEHLER (et ux, Appellant), 316 Pa. 417.

In this case the Supreme Court of Pennsylvania said, *page 419*:

> "In this state of the evidence, appellant is unquestionably entitled to final judgment. However, since no motion for binding instructions or for judgment n. o. v. was made, we are not at liberty to enter judgment for her: Sulzner v. Cappeau-Lemley & Miller Co., 234 Pa. 162; West v. Ins. Co., 277 Pa. 102."

In the present cases after verdict and judgment for petitioners, respondent made no motion for judgments n. o. v. It follows that even under the Pennsylvania practice the Circuit Court of Appeals' decree was unjustified.

Even if we were to assume that these cases were controlled by the Baltimore & Carolina Line Case, it would follow that the present decree would have to be reversed. In the Baltimore & Carolina Line Case this Court was careful to point out that the entry of judgment contrary to the verdict was sanctioned and authorized by express statute of the State of New York where the case was tried. It indicated plainly that its approval of the practice in the Baltimore & Carolina Line Case was conditioned upon, and rendered in deference to, the New York statute. In the

present cases even this support for the Circuit Court of Appeals' action is wanting and compels reversal.

Point 3 (b) THERE WAS SUFFICIENT EVIDENCE TO GO TO THE JURY ON THE QUESTION OF CONSENT TO CANCELLATION.

The Glenwood Industrial Distilling Company owned a property located on Cedar Street north of Tioga Street in the City of Philadelphia. John M. Kennedy, 3d, held a first mortgage on this real estate. The Corn Exchange National Bank and Trust Company had acquired a second mortgage on the same property. It instituted foreclosure proceedings on that mortgage, and at or about the time of the foreclosure applied to petitioners for insurance, informing petitioners of the situation which existed with respect to the property intended to be insured. As a consequence of that disclosure there was attached to each of the policies a clause setting forth the fact that the buildings intended to be insured were under foreclosure proceedings on the security held by the Corn Exchange National Bank and Trust Company, that the premium for the insurance was being paid by the Corn Exchange National Bank and Trust Company and that, in the event of loss, the same would be adjusted with the Corn Exchange National Bank and Trust Company, such loss to be paid to it and John M. Kennedy, 3d, mortgagee, as their respective interests might appear (Rec., pp. 40, 53, 64).

After the Sheriff's sale the Corn Exchange National Bank and Trust Company concluded that there was no equity in the property and decided not to proceed further, but to abandon its bid. It then occurred to the Corn Exchange National Bank and Trust Company that there were unearned premiums refundable if the insurance policies were surrendered for cancellation. Realizing that under the form in which the policies were written Kennedy had an interest, it proceeded through its attorney, Nochem S. Win-

net, to take up with Kennedy the question of the surrender of the policies for cancellation or the purchase by Kennedy of the policies, Kennedy to pay the premium for the remainder of the term for which the policies would be effective.

Kennedy's statement of his conversation with Mr. Winnet appears (Rec., p. 82) as follows:

> "Q. At the time Mr. Winnet told you that the policies were cancelled—being surrendered for cancellation, you made no objection to that, did you?
>
> "A. As I recall the telephone conversation, Mr. Winnet said that he was cancelling, unless I chose to buy or take over the policies, to pay the unexpired premium. As I understood him, he was cancelling. I told him that I didn't intend to pay any unexpired premium or anything else, that I intended to put no further money into that building."

It is, of course, readily understandable that up until the time that the Corn Exchange National Bank and Trust Company reached a definite conclusion, that there was no equity in the property which it ought to protect by insurance, it was willing to assume, and did assume, the cost of the insurance that was carried thereon. However, when it realized that there was no equity to protect, the Corn Exchange National Bank and Trust Company then did what it was perfectly natural for it to do and what one would expect it to do; namely, recoup as much as possible on any expenses which it had incurred in connection with this particular property. It, therefore, sent for Kennedy and told him that it would cancel the policies unless he wanted to buy them. Kennedy was thereby afforded the opportunity of keeping in force contracts in which he had an interest by the payment of such amount as would continue the policies in effect until the date of expiration named therein. This Kennedy was not prepared or willing to do, but on the con-

trary he himself admits that he informed Winnet, when he was afforded the opportunity of buying this insurance for which he had paid nothing, that he did not intend to pay any unexpired premiums or other obligations in connection with the subject matter of the insurance. (Rec., p. 82.)

The situation thus disclosed by Kennedy's testimony is that he had an election either to buy the insurance or, by his refusal to purchase, permit the policies to be cancelled. He elected to adopt the latter alternative. The policies were surrendered, the return premiums paid to the bank which had originally paid the premiums for the insurance, and the transaction concluded approximately one month before the fire occurred.

Mr. Winnet's testimony while couched in different phraseology clearly discloses Kennedy's consent to the cancellation of the policies. He testified (Rec., pp. 108-109) as follows:

> "Q. Did you represent the Corn Exchange National Bank & Trust Company in connection with the foreclosure of a mortgage on the Glenwood Distillery Company property?
>
> "A. I did.
>
> "Q. What, if anything, did you have to do with the placing of the policies of insurance here in suit?
>
> "A. Mr. Kennedy had asked for insurance, because there had been a cancellation, and I finally asked Mr. Gottlieb to get the insurance as mortgagee.
>
> "Q. Now, will you state whether or not at the time this insurance was obtained, foreclosure proceedings were pending upon the mortgage which the Corn Exchange National Bank held as liquidator of the Union Bank & Trust Company?
>
> "A. There was. We had started a foreclosure suit.
>
> "Q. After the property had been sold at sheriff's

sale, what was done with these policies with reference to surrender for cancellation?

"A. Will you repeat that question?

"Q. After this property had been sold at sheriff's sale, did you discuss with Mr. Kennedy any question of the surrendering of these policies for cancellation?

"A. Yes; I did. I tried to get him to buy the policies. We determined that there was no equity, and we were not getting the title on the sheriff's sale—we just decided to abandon our bid, and I asked him if he wanted the policies, and he said how much would they cost, and I told him, and he said he wasn't going to spend another cent on the property, and I said I was going to cancel them. He says, 'You do what you think best. I am not going to spend another cent on them.'"

Thereafter, on February 6, 1932, Mr. Winnet wrote a letter to Mr. Kennedy which reads (Rec., p. 110):

"Mr. John M. Kennedy, 3rd, February 6, 1932.
Widener Building,
Philadelphia, Penna.

Re: Glenwood Industrial Products Company

Dear Mr. Kennedy:

I was wondering whether or not you have covered the property with the necessary insurance.

Since we decided to abandon our bids at the Sheriff's Sale, I am handing the various policies which were in my possession back to the Bank.

Very truly yours,"

NSW/ES

In cross-examination Mr. Winnet testified (Record, pp. 111-112):

"Q. Isn't it true that at no time in any of your discussions with Mr. Kennedy did he give you his con-

sent, so far as he was concerned, to cancel the policies? Isn't that true?

"Mr. Schell: That is objected to.

"The Court: The trouble is you are usurping the functions of the jury. Now, ask him what Mr. Kennedy did.

"By Mr. Shapiro:

"Q. Is it not true that Mr. Kennedy said, when you told him that you were thinking of cancelling these policies, that so far as he was concerned he would not pay any more money and in so far as he was concerned, you could do what you thought was best for the interests of your client?

"A. That's the substance of it.

"Q. Did he ever at any time tell you that you could cancel all these policies?

"A. He never did."

In the light of this testimony the learned Trial Judge of the United States District Court for the Eastern District of Pennsylvania submitted to the jury for its determination the question as to whether or not in the light of all the circumstances Kennedy had consented to the surrender and cancellation of the policies, saying in a portion of his charge on this subject (Rec., pp. 123-124):

> "Afterward, this other situation to which I have called your attention became acute, and the conservator, the Corn Exchange National Bank and Trust Company, holder of the second mortgage, evidently decided that there was nothing in that property for them, that the security was, in practical effect, nothing, that the property was not worth saving; that after the first mortgage there would be nothing for them, and they said, we will save out of this wreck all we can. What we can save is cancelling these insurance policies which we no longer need. In effect, they said that in view of

the value of the property, we will cancel these insurance policies and save out of the wreck the unearned premium, or as much as we can.

"Now, having made that arrangement with Mr. Kennedy, he being a party to this contract of insurance, it was only fair that they should direct Mr. Kennedy's attention to the fact that they were going to cancel those policies, that they were satisfied that there was no value in the property to satisfy their mortgage, and that we are willing to let everything go and put no more money into it, and get back from the insurance company the unearned premium and take our loss.

"They put the matter up to Mr. Kennedy, saying, we want to give you an opportunity to continue the insurance if you desire, and if you will pay us the unearned premium which would be coming to us on the cancellation of these policies, we will turn the whole benefit of the insurance over to you.

"Realizing that there was nothing of value in the mortgaged premises, Mr. Kennedy, 3rd, said that he would not put any more money in that proposition. It is alleged that he said, 'I won't put a dollar more in that property, and you can do as you please.'

Now, did that mean that you can cancel the policies, and that I, as a party, agree and consent to the cancellation? Is that what he meant by it? Was it tantamount to saying that you can cancel these policies, you may receive the unearned premium, I am done with it, and have no further interest in that policy? Is that what he meant? Is what he said tantamount to that? If it was, he consented to the cancellation of those policies by becoming a party to it and agreeing to it, and I charge you that your verdict must be for the defense, but if he did not, then those policies remained in force, and I charge you, as a matter of law, that he had an interest in those policies, and I charge you that the plaintiff in this case may recover."

The jury decided the question in favor of the petitioners and found as a fact that Kennedy's remarks in conjunction with his actions were a consent on his part to the surrender of the policies for cancellation before the loss occurred. The evidence, we submit, is clear that Kennedy knew and understood that the policies would be cancelled if he did not take them over by paying the premiums for the period of time which would intervene between the date when the Corn Exchange National Bank and Trust Company concluded to abandon any interest in the property and the date of the expiration of the policy contracts. He not only declined to take them over but told the attorney for the Corn Exchange National Bank that he might do with them whatever he thought best. This was not only an abandonment by Kennedy of any interest which he might have in the policies, but was tantamount to an express, positive agreement that the policies be cancelled. Having so agreed, it is unimportant and immaterial whether Kennedy knew of the exact time of the consummation of the cancellation. He knew that the bank intended to surrender the policies. He knew that he had been afforded an opportunity to take the policies over and had declined to do so. He knew that he had expressed himself as not being in any manner interested as to what the bank might do with them and from the time of his conversation with Winnet he had left the bank in the position of doing what it saw fit with the policies. Whatever it concluded to do was obviously satisfactory to him. Certainly Kennedy's statements to Winnet authorized the consummation of the cancellation and, when the cancellation was effected, Kennedy was bound by the act of the bank in surrendering the policies for that purpose.

In the original opinion of the Circuit Court of Appeals, Circuit Judge Thompson said (Rec., p. 149):

> "The issue is whether the policies were in force at the time of the fire or whether Kennedy had acquiesced

in their cancellation. At the trial sufficient emphasis was placed upon the question whether the conversation between Kennedy and Winnet amounted to a consent by Kennedy to a cancellation of the policies. This issue was presented to the jury which, by its verdict, must have decided it in the affirmative."

This we submit is a correct statement of the legal question presented. The evidence offered was such that the jury had a right to find, as it did find, that Kennedy had acquiesced in the cancellation of these policies. The mere fact that several days went by between the date of the conversation which Winnet had with Kennedy and the date of the actual cancellation of the policies, is certainly not important. The Corn Exchange National Bank and Trust Company had the right to assume that Kennedy's acquiescence was effective unless withdrawn. Once having obtained his consent, it certainly was not necessary from a legal standpoint to re-obtain his consent solely because the policies were not actually delivered into the possession of the companies until a short time after the conversation occurred. What Kennedy did was to permit the bank, which obtained and paid for the policies, to surrender and receive the return premiums. Certainly Kennedy could not and did not expect the Corn Exchange National Bank when it came to realize that there was no equity in the property to continue to pay for and carry insurance solely for his benefit. He was afforded an opportunity to take over these policies. He understood that if he did not, they would be surrendered for cancellation. He not only declined to purchase the contracts but by his words and actions acquiesced in their surrender. The jury so found and the Circuit Court of Appeals for the Third Circuit was in error in overruling this fact finding.

Point 4. CONTRACTS OF INSURANCE MAY BE CANCELLED BY MUTUAL CONSENT.

It will be recalled from what has heretofore been stated that in the first opinion rendered by the Circuit Court of Appeals, the court held that the trial court had submitted to the jury with sufficient emphasis the question as to whether or not Kennedy had acquiesced in the cancellation of the policies. It, however, concluded that there was another important question which the trial court had overlooked; namely, whether or not Kennedy's conversation with Winnet amounted to a waiver of his right to notice of cancellation.

This conclusion of the Circuit Court is fallacious for two reasons:

(1) The cancellation was not requested by the companies.

(2) It is not necessary to give a person notice of his own act.

The policies of insurance contain the following provisions with respect to cancellation:

> "Cancellation of policy — This policy shall be cancelled at any time at the request of the insured; in which case the Company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time. This policy may be cancelled at any time by the Company, by giving to the insured a five days' written notice of cancellation, with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium (if

not tendered) will be refunded on demand.'' (Rec., pp. 45, 57.)

''This Company reserves the right to cancel this Policy at any time as provided by its terms, but in such case this Policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice to the mortgagee (or trustee) of such cancellation and shall then cease, and this Company shall have the right, on like notice, to cancel this agreement.'' (Rec., pp. 40, 53, 63.)

The Court will note that the policies could be cancelled at any time at the request of the insured and the other provisions contained in the cancellation clause of the policies and in the clause with respect to cancellation set forth in the standard mortgage clause refer only to what must be done by the company when it endeavors to effect a cancellation of the contract. Those particular parts of the respective clauses to which we have referred, have no applicability and play no part in this controversy. The United States Circuit Court of Appeals in its first opinion wholly confounded the situation and entirely overlooked that an insurance contract like any other contract may be cancelled by mutual consent and the provision which gives to the assured the right to cancel at any time.

There are numerous authorities to support our contention of the right to cancel by mutual consent without notice. Among those authorities may be noted the following:

HiGRADE OIL CO. v. U. S. FIDELITY & GUARANTY INS. CO., 93 W. Va. 448;
INSURANCE CO. v. JOHNSON, 105 Fed. 286;
WESTCHESTER FIRE INSURANCE CO. v. McWILLIAMS, 188 S. W. 25 (Tex.);
HILLOCK v. INSURANCE CO., 54 Mich. 531;
SCHEEL v. INSURANCE CO., 228 Pa. 44;

INSURANCE CO. of N. A. v. McWilliams, 218 S. W. 80 (Tex.);
OCEAN ACC. & GTY. CORP. v. MEETS, 61 Utah 426.

The syllabus in the case of

FARMERS' MUTUAL INSURANCE CO. v. WENGER, 90 Pa. 220,

is as follows:

"The by-laws of a mutual insurance company provided that the liability of a member should continue, until the cancellation of his policy and the erasure of his name from the books of the company. Held, that the company was relieved from liability for a loss by fire after a voluntary surrender of his policy by a holder, without a formal cancellation of the same and the erasure of his name from the books of the company."

In the case of

McRAE v. MERCURY INSURANCE CO., 126 Neb. 469,

the Court said (p. 473):

"(1) 'An agreement for an immediate cancellation without giving five days' notice can be made, and this may be shown by acts and conduct as well as by direct words.' Home Ins. Co. v. Chattahoochee Lumber Co., 126 Ga. 334, 55 S. E. 11, 12. The same principle applies to a life insurance policy. Missouri State Life Ins. Co. v. Hill, 109 Ark. 17, 159 S. W. 31.

"(2) Acquiescence in a cancellation notice will operate to cancel the policy and will work an estoppel to assert that the policy is still in force. Hopkins & Cochran v. Phoenix Ins. Co., 78 Iowa, 344, 43 N. W. 107; Hilock v. Traders' Ins. Co., 54 Mich. 531, 20 N. W.

571; Missouri State Life Ins. Co. v. Hill, 109 Ark. 17, 159 S. W. 31."

In the case of

LaFRANCE WORKSHOP LAMPSHADE CO. v. BUFFALO INSURANCE CO., et al., 318 Pa. 191,

in which the appellant raised the same proposition as is raised here: namely, that notwithstanding the fact that the policies had been cancelled by mutual consent or agreement, the assured was still entitled to notice of cancellation as provided in the policy, the Supreme Court said (p. 195):

"In appellant's argument it is suggested that, as the policies contained a provision for cancellation 'at any time by the company, by giving to the insured a five days' written notice of cancellation. . . .' etc., and, as no notice was given by the companies direct to the plaintiff, the policies were nevertheless in force. The contention must be rejected. For the purposes of this insurance, plaintiff and Lare and Company were one; the authority conferred on Lare and Company, so far as the insurance companies are concerned with it, was sufficient to justify the companies (cf. Lauer Brewing Co. v. Schmidt, 24 Pa. Superior Ct. 396, 401) in continuing to deal with the broker by accepting the policies from him for cancellation for want of payment of premiums.

"But, properly considered, the action of the companies was not under the cancellation clause quoted. The parties were competent to cancel their contract by agreement at any time. See Scheel v. German-American Ins. Co., 228 Pa. 44, 76 A. 507; Arnfeld v. Guardian Assurance Co., 172 Pa. 605, 34 A. 580; Farmers Mut. Ins. Co. v. Wenger, 90 Pa. 220. Indeed, there was a provision on the subject. 'This policy shall be cancelled at any time at the request of the insured; in

which case the company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time.' "

It will be noted that in the last cited case, the policies were surrendered for cancellation by the agent of the assured. In the instant case Winnet was acting in the same capacity for Kennedy. It will thus be seen that the notice which a party to a contract of insurance is entitled to receive exists only where the insurer seeks to cancel, the purpose of the notice of course being to afford the insured an opportunity to replace the insurance in other companies. The instant case does not present a situation where your petitioners endeavored to cancel the policies, but a case where the policies were cancelled by mutual agreement. The verdict of the jury affirmatively establishes the consent and acquiescence of Kennedy thereto.

The authorities set forth herein establish that no notice is necessary where the policy is cancelled by mutual agreement or consent; and by his consent and acquiescence Kennedy not only waived his right to such notice but is likewise estopped from asserting any rights under the contracts by reason of that consent and acquiescence.

It would be a strange rule of law which would require the giving of notice to a person of his own act.

VI. CONCLUSION.

In view of the foregoing we respectfully submit that the decisions of the Circuit Court of Appeals for the Third Circuit are contrary to the decisions of this Court, of other Federal Courts, and of the Supreme Court of Pennsylvania, result in depriving petitioners of the right to trial by jury, and are not in conformity with the practice prevailing in the Commonwealth of Pennsylvania.

Accordingly the decisions of the Circuit Court of Appeals should be reversed and the judgment entered by the District Court reinstated and affirmed.

Respectfully submitted,

HARRY S. AMBLER, JR.,
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Attorneys for Petitioners.

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CHARLES ELMORE CRO
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 753 OCTOBER TERM, 1936

AETNA INSURANCE COMPANY,
Petitioner,

v.

JOHN M. KENNEDY, 3d, to the Use of ANNA L. BOGASH,
Respondent.

No. 754 OCTOBER TERM, 1936

SPRINGFIELD FIRE & MARINE INSURANCE COMPANY
Petitioner,

v.

JOHN M. KENNEDY, 3d, to the Use of ANNA L. BOGASH,
Respondent.

No. 755 OCTOBER TERM, 1936

THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, LIMITED,
Petitioner,

v.

JOHN M. KENNEDY, 3d, to the Use of ANNA L. BOGASH,
Respondent.

Respondent's Brief Contra Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit

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SUPPLEMENT TO PETITIONERS' STATEMENT OF THE CASE

In addition to the provisions of the policies recited in petitioners' Statement of the Case (Petitioners' Brief, pp. 3, 4), each policy also contained the following union mortgagee clause:

> "Loss or damage, if any, under this Policy, shall be payable to John M. Kennedy, 3rd, as mortgagee, (or trustee) as interest may appear, and this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within-described property * * * "

(Plaintiff's Exhibit 1, Rec. p. 60; Plaintiff's Exhibit 2, Rec. p. 74; Plaintiff's Exhibit 3, Rec. p. 85).

SUMMARY OF ARGUMENT

The only issue in the case was whether Kennedy and the insurance companies had mutually rescinded Kennedy's separate contracts of insurance. The evidence, which contains no factual contradictions, conclusively resolves that issue in the negative. Since that issue is legal, not factual, the order of the Circuit Court neither re-examined a fact tried by the jury, nor deprived petitioners of their right of trial by jury. In any event, both parties waived their right to trial by jury by requesting peremptory instructions and other instructions dealing exclusively with the said legal issue.

ARGUMENT

The effect of the union mortgagee clauses recited above was the creation of a contract of insurance between the insurance companies and the mortgagee, entirely separate and distinct from the contract between the insurance companies and the assured. *Queen Ins. Co. v. Peoples Union Savings Bank* (C. C. A. 3d) 50 F. (2d) 63.

Under the terms of the policies, the insurance companies could have cancelled Kennedy's interest in the policies on ten days notice. Concededly, no notice of any kind was given, and therefore it may not be said that there was any cancellation of Kennedy's interest by the method provided for in the policies. Nor may it be said that the cancellation by the bank of its interest in the policies resulted in the cancellation of Kennedy's interest. Kennedy's interest arose out of a separate contract of insurance created by the union mortgagee clause and this interest could not be diminished or destroyed by any agreement between the insurance companies and the bank.

As above noted the policies specifically provide (Plaintiff's Ex. No. 1, Rec., p. 60; Plaintiff's Ex. No. 2, Rec., p. 74; Plaintiff's Ex. No. 3, Rec., p. 85) that

> "The interest of the mortgagee • • • shall not be invalidated by any act • • • of the mortgagor or owner • • • ."

Certainly the cancellation by the bank of its interest in the policies was an act within the scope and purpose of the clause quoted.

In *3 Joyce on Insurance*, para. 1668, it is said that

> "Notice to the mortgagee is a prerequisite to cancellation under a standard policy containing a mortgagee clause and providing that it may be cancelled at any time at assured's request where it is also provided that

no act or default of any person other than the mortgagee or his agent shall affect his right to recover in case of loss."

and that

"Notice to one of several holding an interest under the policy is insufficient."

The only other method, therefore, whereby Kennedy's separate contracts of insurance could have been rescinded, was by mutual agreement between Kennedy and the insurance companies. This requires, however, Kennedy's consent and as in every other agreement, the consent must be mutual, i. e., there must be a meeting of the minds.

The conduct and language upon which defendants rely to establish Kennedy's consent is contained in the testimony of Nochem S. Winnett, Esq., the attorney for the bank, who was called as a witness by the defendants. The relevant portions of his testimony are contained in full in the Opinion of the Circuit Court, at Record pages 223 to 226 inclusive, and are therefore not repeated here.

It is respectfully submitted that that testimony does not establish Kennedy's consent.

Reading it in a light most favorable to defendants, it shows that Kennedy was advised of the intention of the bank to surrender the policies at some indeterminate future date; that Kennedy knew or should have known, if they did so that his separate contracts of insurance might be cancelled by the companies on ten days' notice and that thereafter perhaps he intended to be without insurance. Until the lapse of the ten days, however, his policy was in full force and effect. In this connection it is important to note that Winnett, the agent of the bank, to whom Kennedy is supposed to have expressed his consent, did not know (and Kennedy also did not know), after the fire whether the policies had been cancelled; and yet defendants contend that it was to Winnet that Kennedy expressed his consent to the cancellation (Rec., p. 153). Certainly, defendants failed to establish an expressed consent and, as a matter of fact,

the defendants' witness Winnett, admitted that Kennedy did not acquiesce in or authorize the cancellation of the policies (Rec. p. 151).

In 12 C. J. 518, "Consent" is defined as follows:

> "Consent, in law, is not a vacant or neutral attitude, and implies something more than a mere acquiescence in a state of things already in existence, or a mere formal act of the mind; it is affirmative in its nature, implying some positive action * * *."

The burden of proving such "consent" rests, of course, on the defendants who raised the defense of cancellation.

As stated in 26 C. J. 515:

> "Where defendant alleges that the contract or policy had been cancelled, the burden is on it of proving cancellation, and incidentally of proving its compliance with conditions precedent to the right to cancel."

See also *3 Joyce on Insurance*, 2848, and cases cited.

Respondent maintains, therefore, that not only did defendants fail to meet this burden but that the evidence clearly establishes that plaintiff did not consent.

Respondent further contends that even if it be assumed (although it is in fact denied) that Kennedy consented to the cancellation of the policies, the consent, not being communicated to the defendants, could not result in a mutual agreement of rescission. There is not a word of testimony in the record to show that the alleged consent of Kennedy was communicated to the defendants, or that they had any knowledge whatever of the conversation between Winnet and Kennedy relied on by defendants to establish Kennedy's consent. Likewise and conversely there is no evidence whatsoever to show that defendants notified Kennedy of the transaction wherein they accepted the policies from the second mortgagee and returned the unearned premiums.

Inasmuch as there was no communication between defendants and Kennedy, there could not be that meeting of the minds requisite for mutual rescission.

As stated in *3 Joyce on Insurance*, sec. 1634, pp. 2765-66:

"It is necessary in cases of rescission or cancellation by agreement that there be a complete contract or meeting of minds, otherwise the agreement will not stand."

And in *Waters v. Annuity Co.*, 144 N. C. 663, 672:

"A contract of insurance may be set aside by mutual consent, the consent of one of the parties being respectfully the consideration for the consent of the other. But where, as here, this is the sole consideration claimed, in order to make a binding agreement there is required the essential element in the law of this and all other contracts—that of mutuality."

In *Sea Ins. Co. vs. Johnston*, 105 Fed. 286, 291, it is said:

"Such, unquestionably, is the effect of the acceptance by the insured of the proposition of rescission if the acceptance is unqualified. The minds of the contracting parties must meet in this case as in that of other contracts."

And in 13 C. J. 601:

"If one party to a contract furnishes a legal ground for rescission, his assent to a rescission declared by the other is unnecessary, but in the absence of such ground all the parties to the contract must assent to its rescission and there must be a meeting of their minds. Hence one party to a contract cannot rescind it by merely giving notice to the other of its intention to do so; the offer on the one side must be accepted on the other, such offer and acceptance being governed by the same rules as govern the inception of contracts generally, as, for example, when the offer is made by mail."

See also, *Thompson v. Stone*, 43 Pa. Sup. 69.

As stated above, there is no evidence whatever to show that the alleged consent of Kennedy to the cancellation of the policies was ever communicated to the defendants, or that they, in turn, notified him of their acceptance of the policies from the second mortgagee, and the subsequent return of the unearned premiums. On the other hand, all the evidence shows that the insurance companies mistakenly believed that Kennedy, despite the mortgagee clause, had no

interest in the policies; that it was therefore unnecessary to obtain his consent to, or give him notice of, cancellation of the policies; and that they therefore dealt solely with the bank, to the entire exclusion of Kennedy, in their negotiations with respect to cancellation of the policies. Under these facts, we respectfully submit that the interest of the mortgagee in the said policies was not cancelled but remained in full force and effect.

It is therefore apparent that the only issue was whether Kennedy and the insurance companies had mutually rescinded Kennedy's separate contracts of insurance. That this is the only issue is not denied by petitioners who in their brief at page 16 say:

> "The sole issue, we repeat, was whether the respondent had consented to cancellation, and this factual issue was fairly presented to the jury who found in your petitioners' favor."

Respondent submits, however, that the issue is legal, not factual; and that the answer thereto is a conclusion of law to be determined by the Court from several undisputed evidentiary and operative facts.

In *Baltimore & Carolina Line, Inc., v. Redman*, 295 U. S. 654 (1935), this Court, in discussing the Seventh Amendment to the Constitution said:

> "The aim of the amendment • • • is to preserve the substance of the common law right of trial by jury • • • whereby • • • issues of law are to be resolved by the Court, and issues of fact are to be determined by the jury."

Since there was in the instant case no issue of fact to be determined by the jury, but only an issue of law to be resolved by the Court, it follows that the Seventh Amendment has not been violated, and that the Circuit Court has neither re-examined a fact tried by the jury, nor deprived petitioners of their right of trial by jury.

In any event, as pointed out by the Circuit Court, both parties admitted that there were no factual contradictions

in the evidence by requesting peremptory instructions (Rec., p. 228).

Petitioners contend, however, since both parties submitted other points for charge, that the case comes within the scope of the exception to the rule enunciated in *Bank of Union v. Fidelity & Casualty Co., of N. Y.* (C. C. A. 8th) 62 F. (2d), 1040, 1041, as follows:

> "Ordinarily, where both parties move for a directed verdict with reservations, it amounts to a waiver of a jury trial, and a submission to the court of questions of fact as well as of law. Beutell v. Magone, 157 U. S. 154, 15 S. Ct. 566, 39 L. Ed. 654; Williams v. Vreeland, 250 U. S. 295, 39 S. Ct. 438, 63 L. Ed. 989, 3 A. L. R. 1038. But, where a party makes such motion, and at the same time requests instructions to the jury which show he does not intend to waive his right to jury trial if his motion is overruled, he cannot be held to have waived a trial by jury of the *fact questions.*" (Italics ours.)

Respondent submits, however, first, that there were no "*fact questions*"; secondly, that since there were none, mere requests for instructions could not create them; and thirdly and finally, that the instructions requested by both parties dealt with the single legal question of whether the policies were in force as to Kennedy at the time of the fire (Rec. pp. 172-178).

In conclusion, respondent respectfully submits that the evidence will sustain a judgment only for plaintiff in the agreed sum of $11,000.00, and that the ends of justice will be best served by permitting that judgment to stand and not by retrying a cause in which the facts are undisputed, and whose inevitable result, if retried, would be a similar judgment for plaintiff.

Respectfully submitted,

HARRY SHAPIRO,
Attorney for Respondent.

APR 1937
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 753 OCTOBER TERM, 1936

AETNA INSURANCE COMPANY,
Petitioner,

vs.

JOHN M. KENNEDY, 3d, to the Use of ANNA L. BOGASH,
Respondent.

No. 754 OCTOBER TERM, 1936

SPRINGFIELD FIRE & MARINE INSURANCE COMPANY,
Petitioner,

vs.

JOHN M. KENNEDY, 3d, to the Use of ANNA L. BOGASH,
Respondent.

No. 755 OCTOBER TERM, 1936

THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, LIMITED,
Petitioner,

vs.

JOHN M. KENNEDY, 3d, to the Use of ANNA L. BOGASH,
Respondent.

RESPONDENT'S BRIEF ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

HARRY SHAPIRO,
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SUPPLEMENT TO PETITIONERS' STATEMENT OF THE CASE

In addition to the provisions of the policies recited in petitioners' Statement of the Case (Petitioners' Brief, pp. 2-5), each policy also contained the following union mortgagee clause:

> "Loss or damage, if any, under this Policy, shall be payable to John M. Kennedy, 3rd, as mortgagee, (or trustee) as interest may appear, and this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within-described property * * *"

(Plaintiff's Exhibit 1, Rec. p. 40; Plaintiff's Exhibit 2, Rec. p. 53; Plaintiff's Exhibit 3, Rec. p. 63.)

SUMMARY OF ARGUMENT

1. Kennedy's separate contracts of insurance were not cancelled.

2. The direction of judgments was substantially and sufficiently in conformity with state practice.

3. Petitioners waived a trial by jury.

4. The order of the Circuit Court did not violate the Seventh Amendment.

ARGUMENT

I.

KENNEDY'S SEPARATE CONTRACTS OF INSURANCE WERE NOT CANCELLED

The effect of the union mortgagee clauses recited above was the creation of a contract of insurance between the insurance companies and the mortgagee, entirely separate and distinct from the contract beetween the insurance companies and the assured. *Queen Ins. Co. v. Peoples Union Savings Bank* (C. C. A. 3d) 50 F. (2d) 63.

Under the terms of the policies, the insurance companies could have cancelled Kennedy's interest in the policies on ten days' notice. Concededly, no notice of any kind was given, and therefore it may not be said that there was any cancellation of Kennedy's interest by the method provided for in the policies. Nor may it be said that the cancellation by the bank of its interest in the policies resulted in the cancellation of Kennedy's interest. Kennedy's interest arose out of a separate contract of insurance created by the union mortgagee clause and this interest could not be diminished or destroyed by any agreement between the insurance companies and the bank.

As above noted the policies specifically provide (Plaintiff's Ex. No. 1, Rec., p. 40; Plaintiff's Ex. No. 2, Rec., p. 53; Plaintiff's Ex. No. 3, Rec., p. 63) that

> "The interest of the mortgagee • • • shall not be invalidated by any act • • • of the mortgagor or owner • • •"

Certainly the cancellation by the bank of its interest in the policies was an act within the scope and purpose of the clause quoted.

In *3 Joyce on Insurance*, para. 1668, it is said that

> "Notice to the mortgagee is a prerequisite to cancellation under a standard policy containing a mortgagee

clause and providing that it may be cancelled at any time at assured's request where it is also provided that no act or default of any person other than the mortgagee or his agent shall affect his right to recover in case of loss,"

and that

"Notice to one of several holding an interest under the policy is insufficient."

The only other method, therefore, whereby Kennedy's separate contracts of insurance could have been rescinded, was by mutual agreement between Kennedy and the insurance companies. This requires, however, Kennedy's consent and as in every other agreement, the consent must be mutual, i. e., there must be a meeting of the minds.

The conduct and language upon which defendants rely to establish Kennedy's consent is contained in the testimony of Nochem S. Winnett, Esq., the attorney for the bank, who was called as a witness by the defendants. The relevant portions of his testimony are contained in full in the Opinion of the Circuit Court, at Record pages 158 to 161 inclusive, and are therefore not repeated here.

It is respectfully submitted that that testimony does not establish Kennedy's consent.

Reading it in a light most favorable to defendants, it shows that Kennedy was advised of the intention of the bank to surrender the policies at some indeterminate future date; that Kennedy knew or should have known, if they did so that his separate contracts of insurance might be cancelled by the companies on ten days' notice and that thereafter perhaps he intended to be without insurance. Until the lapse of the ten days, however, his policies, under their terms, were in full force and effect; and he said nothing about relinquishing his right to notice if the company decided to cancel his separate contracts pursuant to the ten day notice clause.

In this connection it is important to note that Winnett, the agent of the bank, to whom Kennedy is supposed to have

expressed his consent, did not know (and Kennedy also did not know), after the fire whether the policies had been cancelled; and yet defendants contend that it was to Winnett that Kennedy expressed his consent to the cancellation (Rec., p. 113). Certainly, defendants failed to establish an expressed consent and, as a matter of fact, the defendants' witness Winnett, admitted that Kennedy did not acquiesce in or authorize the cancellation of the policies (Rec. pp. 111, 112).

In 12 C. J. 518, "Consent" is defined as follows:

> "Consent, in law, is not a vacant or neutral attitude, and implies something more than a mere acquiescence in a state of things already in existence, or a mere formal act of the mind; it is affirmative in its nature, implying some positive action * * *."

The burden of proving such "consent" rests, of course, on the defendants who raised the defense of cancellation.

As stated in 26 C. J. 515:

> "Where defendant alleges that the contract or policy had been cancelled, the burden is on it of proving cancellation, and incidentally of proving its compliance with conditions precedent to the right to cancel."

See also *3 Joyce on Insurance*, 2848, and cases cited.

Respondent maintains, therefore, that not only did defendants fail to meet this burden but that the evidence clearly establishes that plaintiff did not consent.

It should be noted that petitioners' argument that the contracts were mutually rescinded is based on the unfounded assumption that Winnet was Kennedy's agent. It is submitted that the record is clear that Winnet was not Kennedy's agent, and acted not for him, but for the bank, whose interests here were adverse and hostile to those of Kennedy.

Respondent further contends that even if it be assumed (although it is in fact denied) that Kennedy consented to the cancellation of the policies, the consent, not being communicated to the defendants, could not result in a mutual

agreement of rescission. There is not a word of testimony in the record to show that the alleged consent of Kennedy was communicated to the defendants, or that they had any knowledge whatever of the conversation between Winnet and Kennedy relied on by defendants to establish Kennedy's consent. Likewise and conversely there is no evidence whatsoever to show that defendants notified Kennedy of the transaction wherein they accepted the policies from the second mortgagee and returned the unearned premiums.

Inasmuch as there was no communication between defendants and Kennedy, there could not be that meeting of the minds requisite for mutual rescission.

As stated in *3 Joyce on Insurance*, sec. 1634, pp. 2765-66:

> "It is necessary in cases of rescission or cancellation by agreement that there be a complete contract or meeting of minds, otherwise the agreement will not stand."

And in *Waters v. Annuity Co.*, 144 N. C. 663, 672:

> "A contract of insurance may be set aside by mutual consent, the consent of one of the parties being respectfully the consideration for the consent of the other. But where, as here, this is the sole consideration claimed, in order to make a binding agreement there is required the essential element in the law of this and all other contracts—that of mutuality."

In *Sea Ins. Co. vs. Johnston*, 105 Fed. 286, 291, it is said:

> "Such, unquestionably, is the effect of the acceptance by the insured of the proposition of rescission if the acceptance is unqualified. The minds of the contracting parties must meet in this case as in that of other contracts."

And in 13 C. J. 601:

> "If one party to a contract furnishes a legal ground for rescission, his assent to a rescission declared by the other is unnecessary, but in the absence of such ground all the parties to the contract must assent to its rescission and there must be a meeting of their minds. Hence

one party to a contract cannot rescind it by merely giving notice to the other of its intention to do so; the offer on the one side must be accepted on the other, such offer and acceptance being governed by the same rules as govern the inception of contracts generally, as, for example, when the offer is made by mail."

See also, *Thompson v. Stone*, 43 Pa. Sup. 69.

As stated above, there is no evidence whatever to show that the alleged consent of Kennedy to the cancellation of the policies was ever communicated to the defendants, or that they, in turn, notified him of their acceptance of the policies from the second mortgagee, and the subsequent return of the unearned premiums. On the other hand, all the evidence shows that the insurance companies mistakenly believed that Kennedy, despite the mortgagee clause, had no interest in the policies; that it was therefore unnecessary to obtain his consent to, or give him notice of, cancellation of the policies; and that they therefore dealt solely with the bank, to the entire exclusion of Kennedy, in their negotiations with respect to cancellation of the policies. Under these facts, we respectfully submit that the interest of the mortgagee in the said policies was not cancelled but remained in full force and effect.

II.

THE DIRECTION OF JUDGMENTS WAS SUBSTANTIALLY AND SUFFICIENTLY IN CONFORMITY WITH STATE PRACTICE

Petitioners argue that the order of the Circuit Court remanding the causes for the entry of judgments *n. o. v.* was invalid, because respondent had not requested the Trial Judge, after the verdict, to enter such judgments.

This practice, which exists in our state courts, does not, however, exist in the federal courts in this Commonwealth, and has not existed since the decision of this Court in *Slocum v. N. Y. Life Ins. Co.*, 228 U. S. 364, in 1913. The discontinuance of the practice which had theretofore existed

was due to the general and unquestioned impression that the *Slocum* case held that the entry of such judgments, under any circumstances, violated the Seventh Amendment. So prevalent and unshakeable was this impression that even subsequent to the decision in 1935 in *Baltimore & Carolina Line, Inc. v. Redman*, 295 U. S. 654, it was said, in a case arising in a District Court in the state:

> "Under the decision in Slocum v. New York Life Insurance Co. (1913) 228 U. S. 364, 33 S. Ct. 523, 57 L. Ed. 879, Ann. Cas. 1914D, 1029, I cannot consider the motion for judgment non obstante veredicto as such, but shall dispose of the point raised by that motion in deciding whether defendants' request for binding instructions shall have been granted. This I consider to be in conformity with the procedure sanctioned by the Supreme Court in Baltimore & Carolina Line, Inc. v. Redman (1935) 295 U. S. 654, 55 S. Ct. 890, 79 L. Ed. 1636."
>
> *Penn Anthracite Mining Co. v. Dela. & H. R. Corp.*, (D. C. M. D. Pa. 1936) 16 F. Supp. 732, 734.

The instant causes were tried in April, 1934. Respondent's counsel, after the verdict, filed a motion for a new trial alleging as error, *inter alia*, the refusal of the trial Judge to affirm plaintiff's point for binding instructions, but did not, for the reasons stated, file a motion for judgments *n. o. v.* Before the appeal to the Circuit Court was argued however, the *Redman* case was decided; and thereupon respondent's counsel moved the court, both in the printed briefs and at the oral argument, to enter judgments *n. o. v.*

The state statute providing for judgments *n. o. v.* is as follows:

> "Whenever, upon the trial of any issue, a point requesting binding instructions has been reserved or declined, the party presenting the point may within the time prescribed for moving for a new trial, or within such other or future time as the court shall allow, move the court to have all the evidence taken upon the trial

duly certified and filed so as to become part of the record, and for judgment non obstante veredicto upon the whole record; whereupon it shall be the duty of the court, if it does not grant a new trial, to so certify the evidence, and to enter such judgment as should have been entered upon that evidence, at the same time granting to the party against whom the decision is rendered an exception to the action of the court in that regard. From the judgment thus entered either party may appeal to the Supreme or Superior Court, as in other cases, which shall review the action of the court below, and enter such judgment as shall be warranted by the evidence taken in that court."

ACT OF APRIL 22, 1905, P. L. 286, as amended April 9, 1925, P. L. 221 (12 Purdon's Penna. Statutes Annotated, Sec. 681.)

It is apparent that the act contemplates two procedural conditions precedent to the granting of the judgments: *first*, that the motion for a directed verdict shall be made at the trial, and reserved or declined, and the question thereafter preserved; and *secondly*, that the evidence shall be certified and filed so as to become part of the record. Both conditions are here present. Respondent requested binding instructions; the Court, in declining, granted an exception to its ruling; and the evidence was certified and filed (Rec. pp. 127, 129, 132, 137).

Hence there was substantial and sufficient compliance with the provisions of the act which, since it deals with the review of judgments, is advisory and not mandatory: *Indianapolis & St. Louis RR. Co. v. Horst*, 93 U. S. 291; *Hein v. Westinghouse Airbrake Co.*, 168 F. 766; *Cudahy Packing Co. v. City of Omaha*, 24 F. (2d) 3; *Associated Mfg. Corp. v. DeJong*, 64 F. (2d) 64.

Certainly the order directing the entry of judgments for plaintiff complied with the Circuit Court's duty to "give judgment after an examination of the entire record before the Court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the

parties". Judicial Code, Sect. 269, as amended, 28 U. S. C., Sect. 391; *Camp v. Gress*, 250 U. S. 308; *Southern Oil Corp. v. Waggoner*, 276 F. 487."

III.

PETITIONERS WAIVED A TRIAL BY JURY.

The Circuit Court found there were no factual contradictions in the evidence, and that both parties assumed this to be true by requesting peremptory instructions (Rec. p. 162).

Petitioners contend, however, since both parties submitted other points for charge, that the case comes within the scope of the exception to the rule enunciated in *Bank of Union v. Fidelity & Casualty Co., of N. Y.* (C. C. A. 8th) 62 F. (2d), 1040, 1041, as follows:

> "Ordinarily, where both parties move for a directed verdict with reservations, it amounts to a waiver of a jury trial, and a submission to the court of questions of fact as well as of law. Beutell v. Magone, 157 U. S. 154, 15 S. Ct. 566, 39 L. Ed. 654; Williams v. Vreeland, 250 U. S. 295, 39 S. Ct. 438, 63 L. Ed. 989, 3 A. L. R. 1038. But, where a party makes such motion, and at the same time requests instructions to the jury which show he does not intend to waive his right to jury trial if his motion is overruled, he cannot be held to have waived a trial by jury of the *fact questions*." (Italics ours.)

Certainly petitioners did not expressly reserve their rights against waiver: *Sampliner v. Motion Picture Patents Co.*, 254 U. S. 233; *Union Indemnity Co. v. U. S.*, 74 F. (2d) 645. Respondent submits, moreover, *first*, that there were no *"fact questions"*; *secondly*, that since there were none, mere requests for instructions could not create them; and *thirdly* and finally, that all the instructions requested by both parties dealt with the single legal question of whether the policies were in force as to Kennedy at the time of the fire (Rec. pp. 127, 131).

IV.

THE ORDER OF THE CIRCUIT COURT DID NOT VIOLATE THE SEVENTH AMENDMENT

In reversing the judgments, the Circuit Court said (Rec. p. 162):

> "• • • the evidence will not sustain the verdict for the defendant. We did not go quite far enough when the case was here before. Under the authority of Baltimore & Carolina Line, Inc. v. Redman, 295 U. S. 654 and Kaeppel v. Mutual Life Insurance Company of New York, 78 Fed. (2d) 899, the petition for rehearing is denied and the case remanded to the District Court with directions to enter judgment for the plaintiff for $11,000.00 with interest thereon from March 25, 1932, the amount counsel agreed to be due the plaintiff if she is entitled to a judgment."

Petitioners argue that since the verdict was not taken subject to the reservation of a point for binding instructions, the *Slocum* case, and not the *Redman* case, controls.

Respondent respectfully submits that there is no foundation whatever in reason or logic for the distinction between declining and reserving a point requesting binding instructions. Actually the difference is one only of practice: *e. g.*, in New York the verdicts are taken subject to the reservation of decision on the motion, and the motion subsequently determined as in the *Redman* case; and in Pennsylvania the motion is affirmed or denied, the verdict taken, and the motion thereafter re-examined and determined on a motion for judgment *n. o. v.* as in the *Slocum* case. Hence it is not too much to say that if the *Redman* case had been tried in Pennsylvania there would have been no reservation of the point, and consequently, if the *Slocum* case is still controlling law, the appellate court would have lacked power to enter judgment *n. o. v.*, although the procedural codes and practice in both states authorize such judgments whenever the ends of justice require them.

The lack of real distinction between the situations has long been recognized in Pennsylvania by the act hereinabove quoted, which authorizes such judgments whenever the point has been "reserved or declined". More recently, the unreality of the alleged difference has been recognized by this Court's Advisory Committee on Rules for Civil Procedure, who recommended the following rule:

> "*Rule 56: Motion for a directed verdict* • • •
>
> Whenever a motion for a directed verdict made at the close of all the evidence is not granted, the court shall be deemed to have reserved decision thereon and to have taken the verdict subject to a later determination of the questions involved • • •." (Preliminary Draft of Rules, etc., May, 1936, p. 101.)

It should also be noted that the learned Trial Judge granted an exception to his ruling declining plaintiff's motion for a directed verdict and thereby preserved the question for review thereafter (Rec. p. 127). It follows, therefore, since the court has a plenary power during the term to modify, revoke or reverse its judgments (*Bronson v. Schullen*, 104 U. S. 210; *Zimmern v. U. S.*, 298 U. S. 167), that the instant cause comes within the *rationale*, if not the letter, of the *Redman* case.

Respondent urges, in conclusion, that the Seventh Amendment was not violated because there were no contradictions in the evidence, and the single issue involved was legal and not factual. That issue admittedly was whether Kennedy had consented to the cancellation of his separate policies of insurance. The Circuit Court held that there was not sufficient evidence to go to the jury on that question.

In the *Redman* case, Mr. Justice Van Devanter said, at pages 657, 659:

> "The aim of the amendment • • • is to preserve the substance of the common law right of a trial by jury • • • whereby • • • issues of law are to be resolved by the court, and issues of fact are to be determined by the jury • • •.

> • • • defendants' [motion] • • • for a directed verdict • • • [was] based on the asserted insufficiency of the evidence to support a verdict for the plaintiff. Whether the evidence was sufficient or otherwise was a question of law to be resolved by the Court."

In the *Slocum* case, in language altogether applicable to the pattern and issue of the present cause, the present Chief Justice, in a dissenting opinion in which three other justices concurred, said, *inter alia*, at pages 400, 401:

> "What, then, is this case? It was an action upon a policy of insurance. It was triable by jury, but the province of the jury was to decide questions of fact, not questions of law. This court concludes, as did the Court of Appeals, that 'the evidence did not admit of a finding that the policy was in force at the time of the insured's death'. In other words, after the plaintiff had had full opportunity to present her case and to show facts for the consideration of the jury, and the case on both sides had been closed, it appeared that there were no facts whatever upon which the jury would be warranted in finding a verdict in her favor. Hence, says this court, the defendant was entitled to a direction of a verdict in its favor, as it requested. Had the trial court rightly applied the law, the case would properly have ended in a final judgment for the defendant. But the trial court erred in the law, and consequently the jury found a verdict for the plaintiff—not upon facts but without any facts upon which they could rest it. Now it is said that a statute which permits the trial court or the appellate court, after that wrongful verdict, to correct the error, and in so doing not only to set aside the verdict but to direct the entry of the judgment to which the defendant in law was entitled is, as applied to a case in the Federal court, contrary to the Constitution.
>
> The Seventh Amendment provides that 'no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law'. But, wherein has any matter of fact tried by a jury been re-examined? Concededly, there was no fact to be tried by a jury; the case as made was barren of any such fact; and there being none, there

has been no re-examination of it. How can it be said that the Circuit Court of Appeals has determined the facts or has passed upon issues of fact? Whether there was any evidence for the jury was a question of law. The trial court, in wrongly deciding it, did not convert it into a question of fact; it was not altered by the verdict, but remained the same in its nature—a question for the determination of the court."

Respondent respectfully suggests that if the *Slocum* case be read in the light of the foregoing quotations from the *Redman* case, its dissenting opinion, and not its majority decision, is today law. If, however, that decision is still an impassable barrier to the power of a federal court to enter judgment *n. o. v.* in a case where the only question is the sufficiency of the evidence, then it is urged that the decision requires re-examination and present modification by the adoption herein of its dissenting opinion.

All of which is respectfully submitted.

HARRY SHAPIRO,
Attorney for Defendant.

SUPREME COURT OF THE UNITED STATES.

Nos. 753, 754, 755.—October Term, 1936.

Aetna Insurance Company, Petitioner,
753 *vs.*
John M. Kennedy, 3d, to the use of Anna L. Bogash.

Springfield Fire & Marine Insurance Company, Petitioner,
754 *vs.*
John M. Kennedy, 3d, to the use of Anna L. Bogash.

The Liverpool and London and Globe Insurance Company, Limited, Petitioner,
755 *vs.*
John M. Kennedy, 3d, to the use of Anna L. Bogash.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[May 17, 1937.]

Mr. Justice Butler delivered the opinion of the Court.

Kennedy had a first mortgage and a bank a second mortgage on old brewery property in Pennsylvania owned by a distilling company. The bank procured from petitioners fire insurance policies covering the building. Each policy states it is understood that the insured building is under foreclosure by the bank; the premium being paid by the bank, it is agreed that in event of loss, same will be adjusted with the bank and paid to it and Kennedy, mortgagee, as interest may appear. Each provides for cancelation upon request of the insured and that the company may cancel by giving insured five days written notice. It includes the standard mortgagee clause which provides: Loss or damage shall be payable to Kennedy as mortgagee as interest may appear; insurance as to the interest of the mortgagee shall not be invalidated by any act of the mortgagor or owner; in case the mortgagor or owner shall

neglect to pay premium the mortgagee shall, on demand, pay the same. The company reserves the right to cancel the policy at any time as provided by its terms, but in such case the policy is to continue in force for the benefit of the mortgagee for ten days after notice to him.

After the bid at sheriff's sale in the foreclosure proceedings, the bank abandoned its interest in the property as worthless, notified Kennedy that it intended to cancel the policies and suggested that he buy them. He declined to do so or to pay the bank any part of the premiums and expressed intention not to advance any money in respect of the insured building. The bank surrendered the policies for cancelation; petitioners paid it the unearned premiums. Later, and within the period for which petitioners had insured it, the building burned. Bogash acquired Kennedy's interest and, to recover on the policies, brought these suits. Upon the statements of claim and affidavits of defense, there arose questions whether Kennedy consented to or acquiesced in the surrender and cancelation of the policies and whether they were in force when the loss occurred or had been surrendered and canceled before that time.

The parties, having introduced their evidence and agreed that the amount of the loss was $11,000, submitted their points for charge to the jury. Plaintiff requested the court to instruct the jury in respect of notice to Kennedy of cancelation and surrender of the policies, consent by him that they be canceled, and to direct verdicts in favor of plaintiff for the agreed amount. Defendants requested the court to instruct the jury in respect of the right of cancelation under the policies; that, if the jury should find facts specified in the proposed instructions, its verdicts should be for defendants, and to direct the jury that, upon the pleadings and evidence, the verdicts must be for defendants. The court refused to direct for plaintiff or defendants and, without reserving for later consideration the requests for directed verdicts or any question of law, submitted the cases to the jury. It found for defendants. Plaintiff filed motions for new trial but did not move for judgments non obstante veredicto. The court denied the motions and entered judgments for defendants.

Plaintiff appealed; the Circuit Court of Appeals held the trial court erred in refusing to charge on points concerning notice of cancelation to Kennedy, reversed the judgments of the district

court and ordered new trials. 87 F. (2d) 683. But on plaintiff's application for rehearing it held that, by their requests for peremptory instructions, plaintiff and defendants assumed the facts to be undisputed and submitted to the trial judge the determination of the inferences to be drawn from the evidence and so took the cases from the jury. The court also held that the evidence was not sufficient to sustain verdicts for defendants, denied the petition for rehearing and remanded the cases to the district court with directions to give plaintiff judgments for the agreed amount of the loss. 87 F. (2d) 684.

Questions presented are: Whether, by their request for directed verdicts, the parties waived their right to trial by jury; whether, by reversing the judgments for defendants and directing judgments for plaintiff, the Circuit Court of Appeals deprived defendants of that right; and whether the evidence was sufficient to sustain a finding that Kennedy consented to the cancelation of the policies.

1. The Circuit Court of Appeals erred in holding that, by their requests for peremptory instructions, the parties took the cases from the jury and applied to the judge for decision of the issues of fact as well as of law. The established rule is that where plaintiff and defendant respectively request peremptory instructions, and do nothing more, they thereby assume the facts to be undisputed and in effect submit to the trial judge the determination of the inferences properly to be drawn from them. And upon review a finding of fact by the trial court under such circumstances must stand if the record discloses substantial evidence to support it.[1] But, as the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver.[2] And unquestionably the parties respectively may request a peremptory instruction and, upon refusal of the court to direct a verdict, have submitted to the jury all issues as to which opposing inferences may be drawn from the evidence.[3] Here neither the plaintiff nor the defendants applied for directed

[1] Beutell *v.* Magone, 157 U. S. 154, 157. Sena *v.* America Turquoise Co., 220 U. S. 497, 501. Am. Nat'l Bank *v.* Miller, 229 U. S. 517, 520. Williams *v.* Vreeland, 250 U. S. 295, 298. Oppenheimer *v.* Harriman Nat'l Bank, — U. S. —, —.

[2] Hodges *v.* Easton, 106 U. S. 408, 412. Slocum *v.* New York Life Ins. Co., 228 U. S. 364, 385. Patton *v.* United States, 281 U. S. 276, 312. Dimick *v.* Schiedt, 293 U. S. 474, 486. Foust *v.* Munson S. S. Line, 299 U. S. 77, 84.

[3] Empire State Cattle Co. *v.* Atchison Ry. Co., 210 U. S. 1, 8. Sampliner *v.* Motion Picture Co., 254 U. S. 233, 239.

verdicts without more. With their requests for peremptory instructions they submitted other requests that reasonably may be held to amount to applications that, if a peremptory instruction is not given, the cases be submitted to the jury. Indeed, we find nothing in the record to support the view that the parties waived their right of trial by jury or authorized the judge to decide any issue of fact.

2. The verdicts were taken unconditionally. Plaintiff moved for new trials but not for judgments. The court denied her motions and entered judgments for defendants. The Circuit Court of Appeals had jurisdiction to reverse and remand for new trials but was without power, consistently with the Seventh Amendment, to direct the trial court to give judgments for plaintiff. And, as before submission of the case to the jury the trial court denied plaintiff's motion for directed verdicts without reserving any question of law, neither that court nor the Circuit Court of Appeals had jurisdiction to find or adjudge that notwithstanding the verdicts plaintiff was entitled to recover. *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364, 387. Our decision in *Baltimore & C. Line* v. *Redman*, 295 U. S. 654, is not applicable.

There is another reason why the direction of judgments for plaintiff cannot stand. Under the Conformity Act, 28 U. S. C., § 724, federal courts follow the practice authorized by state statutes if there be nothing in them that is incongruous with their organization or their fundamental procedure or in conflict with congressional enactment.[4] The applicable Pennsylvania statute provides that whenever, upon the trial of any cause, a point requesting binding instructions has been reserved or declined, the party presenting the point may move the court for judgment non obstante veredicto; whereupon it shall be the duty of the court, if it does not grant a new trial, to enter such judgment as should have been entered upon the evidence. From the judgment thus entered either party may appeal to the supreme or superior court which shall review the action of the court below, and enter such judgment as shall be warranted by the evidence taken in that court.[5] As plaintiff failed

[4] Henderson v. Louisville, &c., Railroad, 123 U. S. 61, 64. Amy v. Watertown. No. 1., 130 U. S. 301, 304. Barrett v. Virginian Ry. Co., 250 U. S. 473, 475. Baltimore & C. Line v. Redman, 295 U. S. 654, 658. Cf. Nudd v. Burrows, 91 U. S. 426, 441. Indianapolis, etc. R. R. Co. v. Horst, 93 U. S. 291, 300.

[5] Act of April 22, 1905, P. L. 286; 12 Purdon's Penna. Statutes Annotated, § 681. Quoted in Slocum v. New York Life Ins. Co., 228 U. S. 364, 375-376.

to make appropriate motions in accordance with Pennsylvania practice, the district court did not err in failing to give plaintiff judgments notwithstanding the verdicts.[6] The Conformity Act does not extend to the Circuit Court of Appeals.[7] In the absence of motions for judgments notwithstanding the verdict in the lower court, the appellate court was without authority to direct entry of judgments for plaintiff.

3. Was the evidence sufficient to sustain a finding that, as to Kennedy's interest, the insurance terminated before the fire? As the period for which the policies were written had not expired when the loss occurred, defendants had the burden to show that the insurance was not in force at that time. Kennedy was not merely a designated beneficiary to whom was payable, as specified, insurance obtained by the bank. The mortgagee clause created a contract of insurance between him and the company and effected separate insurance upon his interest.[8] Defendants do not claim that they gave Kennedy any notice of intention to cancel his insurance or that the policies had been surrendered by the bank in accordance with their terms or otherwise.

The evidence shows: After bids were received at foreclosure sale the bank's attorney asked Kennedy to take over the policies and, upon his refusal so to do or to pay the bank anything on account of unearned premiums, informed him that the bank intended to surrender the policies. He expressed no objection, authorization or consent. There is no evidence that before the fire Kennedy had been notified by the bank or by the defendants, or knew, that the bank had surrendered the policies or received return premiums or that defendants attempted to cancel his insurance. The evidence is not enough to support a finding that he intended the building to become or remain uninsured or authorized the bank to act for him in respect of his insurance, or that he consented to, acquiesced in or ratified the surrender or cancelation of the policies. Defendants

[6] West *v.* Manatawny Mut. F. & S. Ins. Co., 277 Pa. 102. Cox *v.* Roehler, 316 Pa. 417, 419-420.

[7] Camp *v.* Gress, 250 U. S. 308, 318.

[8] Syndicate Ins. Co. *v.* Bohn, 65 Fed. 165, 178. Insurance Co. *v.* International Trust Co., 71 Fed. 88, 91. Newark Fire Ins. Co. *v.* Turk, 6 F. (2d) 533, 535. Westchester Fire Ins. Co. *v.* Norfolk Building & Loan Ass'n, 14 F. (2d) 524, 526. Queen Ins. Co. *v.* People's Union Sav. Bank, 50 F. (2d) 63, 64. Kimberley & Carpenter *v.* Fireman's Fund Ins. Co., 78 F. (2d) 62, 64. 4 Joyce, Law of Insurance, 2nd ed., § 2795, p. 4776. Richards, Law of Insurance, 4th ed., § 279, p. 478. Vance on Insurance, 2nd ed., § 170, p. 657.

do not claim that they canceled Kennedy's insurance by giving him notice in accordance with the policies. The Circuit Court of Appeals rightly reversed the judgments of the district court but erroneously directed judgments for plaintiff.

The judgments of the Circuit Court of Appeals are accordingly modified by eliminating the directions to enter judgments for plaintiff and by substituting orders for new trials.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.